

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.**77-1680**

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
GARY DeFILLIPPO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

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Now Comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in the above-entitled cause on December 6, 1977, leave to appeal denied by the Michigan Supreme Court on May 2, 1978.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 80 Mich App 197 (1977) NW2d (1977), and is appended as Appendix "A". The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on December 6, 1977. The Michigan Supreme Court denied Petitioner's application for leave to appeal on May 2, 1978. The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3).

QUESTIONS PRESENTED

I.

Is an arrest made in good faith reliance on an ordinance which has not been declared unconstitutional a valid arrest regardless of the ultimate validity of the ordinance?

II.

If the answer to question I is "No", is an ordinance which provides that it is unlawful for one validly stopped pursuant to *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) to refuse or be unable to provide verifiable proof, written or oral, of his identity unconstitutional as being vague and also a violation of the Fourth Amendment probable cause standard?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Two Detroit Police Officers received a radio call to investigate two allegedly drunken persons in an alley. Upon arrival at the alley the officers found respondent and a female who had her pants down. She was intoxicated; respondent did not appear to be so. When asked for identification respondent replied that he was Sergeant Mash, a Detroit Police Officer. When asked his badge number he then stated that he worked for a Sergeant Mash. He was arrested for failure to produce identification, handcuffed, and searched, the search producing marijuana. At the station phencyclidine was found in a pack of defendant's cigarettes.

Respondent was charged with possession of phencyclidine. MCLA 335.341(4)(b); MSA 18.1070(41)(4)(b). A motion to suppress evidence was denied, and on interlocutory appeal the Michigan Court of Appeals held the ordinance under which respondent was initially arrested unconstitutional (Detroit City Code 39-1-52.3). The court also rejected petitioner's argument that the officer's good faith reliance on the ordinance which had not been declared unconstitutional at the time of the arrest rendered the arrest lawful. On May 2, 1978, the Michigan Supreme Court denied petitioner's application for leave to appeal.

REASONS FOR GRANTING THE WRIT

I.

The issue as to whether an arrest made in good faith reliance on an ordinance which had not been declared unconstitutional at the time of the arrest is a valid arrest, rendering evidence found in a search of the person pursuant to the arrest admissible, is an issue which has split several of the federal circuits, and which has once before been before this Court (though the question was not reached). Stone v Powell, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976).

The Fifth Circuit has consistently held such arrests to be lawful. In United States v Kilgen, 445 F2d 287 (CA 5, 1971), defendant confessed to a crime while being held under a vagrancy ordinance which was subsequently held to be unconstitutional. The court held:

Had Kilgen been convicted for vagrancy, that conviction would necessarily have been reversed when the court held the vagrancy ordinance unconstitutional. But over-turning a conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good faith belief in the validity of the statute. See Pierson v Ray,

. . . No legitimate interest would be served by excluding the confession to the separate crime of stealing postage stamps because we now find the vagrancy ordinance invalid. We therefore hold that the confession to the separate offense was admissible because it was obtained while Kilgen was detained and charged in good faith reliance on an ordinance not yet held invalid.

The defendants in United States v Carden, 529 F2d 443 (CA 5, 1976) were convicted of breaking and

entering a government building, and receiving, concealing and retaining stolen government property. They challenged the search incident to arrest as occurring pursuant to an arrest for a vagrancy statute which they attacked on constitutional grounds. The Court did not find it necessary to reach the constitutional question regarding the statute:

Without intimating any opinion on the constitutionality of the Anniston loitering ordinance, we must reject the Carden's first contention. This Court has held more than once that an arrest made in good faith reliance on a statute not yet declared unconstitutional is valid regardless of the actual constitutionality of the ordinance (citations omitted).

While appellants would be entitled to attack the constitutionality of any convictions under the Anniston ordinance, "there is no bar to the use of evidence of other crimes obtained during incarceration for violation of a law which was valid when the arrest was made." 529 F2d at 445.

This Court had occasion to deal with a similar question in United States v Peltier, 422 US 531; 45 L Ed 2d 374; 95 S Ct 2313 (1975). This Court's view of the Officer's conduct is instructive. This Officers, border patrol agents, conducted a warrantless auto search without probable cause of an auto in close proximity to the border. Such border stops were held unconstitutional in Almedia-Sanchez v United States, 413 US 266; 96 S Ct 2535; 37 L Ed 2d 596 (1973), which was decided subsequent to the conduct complained of, though the issue had been preserved by Peltier. A majority of the Court held:

It was in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval, that border agents stopped and searched respondent's automobile. Since the first roving border patrol case to be decided

may not reasonably rely upon any legal pronouncements emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm (citations omitted). If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. . . . we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car. (emphasis added).

An analagous Michigan case is People v Carpenter, 69 Mich App 81 (1976). Defendant was convicted of carrying a pistol in a motor vehicle. The vehicle was searched and the weapon found after the officer had observed a rifle case in plain view. On appeal, defendant contended that since People v Smith, 393 Mich 432 (1975), decided subsequent to the search, had held that a rifle was not a dangerous weapon within the meaning of MCLA 750.227, the search was unreasonable as lacking probable cause. The Court noted that only the facts, circumstances, and information known to the officers at the time of the seizure should be considered (People v Gonzales, 356 Mich 247 (1959)), and held that since at the time of the search case law held that a rifle was a dangerous weapon within the meaning of MCLA 750.227 (e.g. People v Harper, 3 Mich App 316 (1966)), the search was reasonable.

This Court has had frequent occasion of late to examine the exclusionary rule, and has consistently focussed upon whether application of the rule would deter willful or negligent police conduct which has violated some right of the accused. See United States v Calandra, 414 US 338, 348; 94 S Ct 613, 620; 38 L Ed 2d 561 (1974) (the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); Michigan v Tucker, 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974) ("where the official action was pursued in complete good faith, the deterrence rationale loses much of its force"); United States v Janis, ___ US ___ 49 L Ed 2d 1046, 4056 (1976). ("The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"); and United States v Peltier, *supra*.

The Michigan Court of Appeals in the instant case declined to follow Carden and Kilgen, citing Powell v Stone, 507 F2d 93, 98 (CA 9, 1974), *rev'd on other grounds*, 428 US 465; 96 S Ct 3037; 49 L Ed 1067 (1976). There is unquestionably a split of opinion among the federal circuits; however, petitioner submits that the Ninth Circuit's rationale is dubious given the subsequent United States Supreme Court cases cited, *supra*. It is interesting that certiorari was granted on the precise issue (whether an arrest pursuant to an ordinance later declared to be unconstitutional is a valid arrest) in Powell v Stone, *supra*, where the Ninth Circuit held such arrests invalid. The issue was not reached in this Court's opinion because of its decision on the habeas corpus issue. Certiorari was denied in Carden and Kilgen, where the arrests were upheld. While these observations are not compelling, they are worth noting. Further, several of the Ninth Circuit's premises - that the public interest demands that legislatures be deterred from passing unconstitutional statutes, and that the "imperative of judicial integrity" requires exclusion even when no deterrent effect on future police conduct would be effected - have been substantially eroded by the Supreme Court. See United States v Janis, *supra*, and Stone v Powell itself, at 1083, fn 23:

As we recognized last term, judicial integrity is 'not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted under the constitution.' United States v Peltier . . . (citation omitted).

The Ninth Circuit's holding that the exclusionary rule must be employed to deter legislatures was also undercut by Janis and Powell; "The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'" (emphasis added). Janis, 49 L Ed 2d at 1056. See also Amsterdam, Perspectives On The Fourth Amendment, 58 Minn L Rev 349, 369 (1974) ("... the regulation of police behavior is what the Fourth Amendment is all about.").

Applying the test of Peltier, *supra*, to the instant case, it is clear that application of the exclusionary rule serves no valid purpose. There being a split among federal circuits, petitioner submits that plenary review by this Court is needed.

II.

Petitioner believes that the Michigan Court of Appeals erred in reaching the issue of the constitutionality of the ordinance, as questions of the constitutionality of statutes should not be reached unless necessary, and petitioner argues that the arrest was valid regardless of the constitutionality of the ordinance. (See Issue II) If the answer to Question I is "No", then the issue of the constitutionality of the ordinance must be faced.

People v Weger, 251 CA 2d 584; 59 Cal Rptr 661 (1967) involved a statute declaring one to be guilty of loitering from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such to indicate to a reasonable man that the public safety requires such identification." Cal. Penal Code, S. 647 (3) The Court rejected vagueness, self-incrimination and probable cause challenges to the identification portion of the statute. Analogizing to fingerprint, voiceprint, lineup and other such cases the court observed that "the silence here is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation under circumstances which call for one." The court thus found no right to refuse to give non-testimonial information.

As to the probable cause argument, and the argument in the instant case that the ordinance makes "criminal conduct which is innocent," the court noted that stops are justified on information short of probable cause. Terry v Ohio, 392 US 1, 88 S Ct 1868; 20 L Ed 2d

889 (1968). The ordinance in the instant case requires a valid Terry stop before the identification portion of the ordinance applies. To say that the ordinance is vague or "undercuts" probable cause is but to disagree with Terry, and not in conformance with it. Finally, it should be noted that the Court of Appeals erred in stating that the ordinance allows "full searches on suspicion." The ordinance allows a Terry stop, and makes it a crime to refuse to identify oneself after a valid stop. The search is incident to the refusal to identify, not the stop. See, also People v Solomon, 108 Cal Rptr 867, 33 CA 3d 429 (1973), cert den 415 US 951; 39 L Ed 2d 567; 94 S Ct 1476.

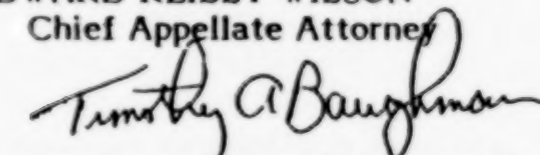
CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully submitted,

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Dated: May 5, 1978.

APPENDIX "A"

OPINION OF THE MICHIGAN COURT OF APPEALS

BEFORE: T.M. Burns, P.J., and R.B. Burns and W.R. Brown, JJ. R.B. BURNS, J.

Defendant was charged with possession of a controlled substance, phencyclidene. MCLA 335.341(4)(b); MSA 18.1070 (41)(4)(b). Prior to trial he moved to suppress evidence obtained in a search of his person and to quash the information. The motion was denied and we granted an interlocutory appeal.

The facts indicate that two Detroit police officers received a radio call to investigate two allegedly drunken persons in an alley. Upon their arrival at the alley, the officers found defendant and a companion. The intoxicated companion was arrested for disorderly conduct. Defendant did not appear intoxicated, but when he was asked for his identification, he replied that he was Sergeant Mash, a Detroit police officer. When asked for his badge number, defendant replied that he was working for Sergeant Mash. Defendant was then arrested for failure to produce identification, handcuffed, and searched. Marijuana was found immediately, and phencyclidene was found later at the station in a pack of defendant's cigarettes.

It is defendant's theory that the Detroit ordinance which allows a police officer to arrest an individual for failure to produce identification is unconstitutional, that the search incident to his arrest was therefore unlawful, and that the evidence must be suppressed. It is plaintiff's theory that we should avoid the issue of the constitutionality of the ordinance, because even if the ordinance is unconstitutional, the police officer's good faith reliance thereon would preclude application of the exclusionary rule. The purpose of the exclusionary rule is to deter unlawful

police conduct, and "where official action was pursued in complete good faith, the deterrence rationale loses much of its force", Michigan v Tucker, 417 US 433, 447; 94 S Ct 2357; 41 L Ed 2d 182, 194 (1974). See United States v Carden, 529 F2d 443 (CA 5, 1976), United States v Kilgen, 445 F2d 287 (CA 5, 1971).

We cannot subscribe to plaintiff's theory. If, as defendant argues, the ordinance is void for vagueness, subject to arbitrary and discriminatory application, and used as a pretext for unlawful search and seizure, suppression of evidence obtained pursuant to a search incident to arrest thereon will deter unlawful police conduct, and the exclusionary rule should therefore apply. See Powell v Stone, 507 F2d 93, 98 (CA 9, 1974), rev'd on other grounds, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976), United States ex rel. Newsome v Malcolm, 492 F2d 1166, 1174-1175 (CA 2, 1974), Hall v United States, 459 F2d 831, 841-842 (DC Cir, 1972).

At the time of defendant's arrest, Detroit City Code § 39-1-52.3 read as follows:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity."

The ordinance has been slightly amended since defendant's arrest, but there are no significant changes.

The ordinance is void for vagueness.

First, it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden * * *." United States v Harris, 347 US 612, 617; 74 S Ct 808; 98 L Ed 989, 996 (1954), see Papachristou v City of Jacksonville, 405 US 156; 92 S Ct 839; 31 L Ed 2d 140 (1972). An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime. Nor does the ordinance define which of today's numerous forms of identification will satisfy a police officer's desire for verifiable documents. This lack of specificity "encourages arbitrary and erratic arrests", Papachristou v City of Jacksonville, *supra*, by delegating to police officers the determination of who must be able to produce what kind of identification.

Second, the ordinance seeks to make criminal conduct which is innocent. Papachristou v City of Jacksonville, *supra*, Detroit v Sanchez, 18 Mich App 399, 401-204; 171 NW2d 452, 453 (1969).

"Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion,--to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of

another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guaranteed." Pinkerton v Verberg, 78 Mich 573, 584; 44 NW 579, 582-583 (1889).

While police may under certain circumstances intrude upon a person's privacy by stopping him and asking questions, Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), there can be no requirement that the person answer. "[W]hile the police have a right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." Davis v Mississippi, 394 US 721, 727n.6, 89 S Ct 1394, 1397n.6, 22 L Ed 2d 676, 681n.6 (1973). Accord, Terry v Ohio, *supra*, at 34, 20 L Ed 2d at 913 (White, J., concurring).

Third, the ordinance undercuts the probable cause standard of the Fourth Amendment. Papachristou v City of Jacksonville, *supra*; People v Berck, 32 NY2d 567, 300 NE2d 411, 347 NYS 2d 33 (1973). A police officer may make only a limited search of a person he has stopped on suspicion, and then only if he has reason to believe the person is armed and dangerous. Terry v Ohio, *supra*. The Detroit ordinance sanctions full searches on suspicion, without regard for dangerousness, of those persons whose activities fall within the vague parameters of the ordinance.

Since the ordinance is void, the search incident to arrest for violation of the ordinance was unlawful. The evidence should have been suppressed and the information quashed.

Reversed.

¹The amendment, Detroit Ordinance No 158-11 (October 19, 1976) makes clear that refusal to identify oneself is a crime. This was implicit in the ordinance as it read at the time of defendant's arrest, since the ordinance authorized arrest for failure to identify oneself.

APPENDIX "B"

ORDER OF THE MICHIGAN SUPREME COURT

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of April in the year of our Lord one thousand nine hundred and seventy-eight.

Present: The Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

State of Michigan — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of May in the year of our Lord one thousand nine hundred and seventy-eight.

/s/ Corbin Davis
Deputy Clerk.

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Supreme Court, U. S.
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MICHAEL ROBAX, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

—
No. 77-1591
—

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

GARY DeFILLIPPO,

Respondent.

—
SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF PETITION FOR A WRIT OF
CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN
—

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QUESTION PRESENTED

Petitioner submits the attached supplemental authority and rationale under Rule 24 in Support of Question I in the Petition for a Writ of Certiorari:

Is an arrest made in good faith reliance on an ordinance which has not been declared unconstitutional a valid arrest regardless of the ultimate validity of the ordinance?

SUPPLEMENTAL AUTHORITY AND REASON
FOR GRANTING THE WRIT

In this Court's recent decision of Scott v United States, ____ US ____, 56 LEd 2d 168 (May 15, 1978) the Court analyzed the distinction ". . . between what is necessary to establish a statutory or constitutional violation and what is necessary to support a suppression remedy once a violation has been established." 56 LEd 2d at 176. The position of the Government, which also was the basis of the Court of Appeals decision, was held by this Court to embody the "proper approach":

In view of the deterrent purposes of the exclusionary rule consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate after a statutory or constitutional violation has been established. But the existence vel non of such a violation turns on an objective assessment of the officer's action in light of the facts and circumstances confronting him at the time. Subjective intent alone, the Government contends, does not make otherwise lawful conduct illegal or unconstitutional. 56 LEd 2d at 176-177.

In a case such as the instant case, then, where an officer arrests pursuant to an ordinance which has not been declared unconstitutional at the time of the arrest, and searches the person of the arrestee incident to that arrest, the arrest is not unconstitutional and the search is not unreasonable. Since, as stated in Scott, supra, the existence of a constitutional violation turns on an objective assessment ". . . of the officer's actions in light of the facts and circumstances confronting him at the time" (emphasis added), it cannot be said that a circumstance not known to the officer at the time of the arrest (that the ordinance would be declared unconstitutional) relates back to his conduct, invalidating the arrest and search.

Petitioner therefore submits that application of the exclusionary rule is plainly inappropriate in cases where no constitutional violation occurred. The Michigan Court of Appeals should be reversed.

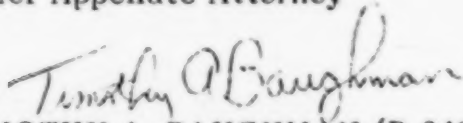
CONCLUSION

It is respectfully submitted that for the reasons outlined above, and the reasons outlined in the Petition for a Writ of Certiorari, a substantial federal question to which there is disagreement in the federal circuits is presented such that plenary review should be granted.

Respectfully submitted,

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Dated: July 21, 1978

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JOINT APPENDIX

Supreme Court, U. S.

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MICHAEL RADAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1680

— • —
THE STATE OF MICHIGAN,
Petitioner,

v

GARY DEFILLIPPO,
Respondent.

— • —
ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED MAY 24, 1977

CERTIORARI GRANTED OCTOBER 2, 1978

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1680

THE STATE OF MICHIGAN,
Petitioner.

v

GARY DEFILLIPPO,
Respondent.

DOCKET ENTRIES

19/6

September 24. Defendant arraigned on warrant for possession of phenylclidene in Detroit Recorder's Court.

September 30. Preliminary examination held; defendant bound over for trial in Detroit Recorder's Court.

November 23. Motion to quash the information and suppress the evidence heard and denied by trial judge.

December 7. Stay of proceedings to file interlocutory appeal granted by trial judge.

1977

June 2. Michigan Court of Appeals grants Application for interlocutory appeal, time for filing halved.

August 2. Motion by Detroit Branch of American Civil Liberties Union to file brief *amicus curiae* on behalf of defendant granted by Court of Appeals.

September 30. Motion of Detroit Bar Association to file brief *amicus curiae* on behalf of defendant granted by Court of Appeals.

December 6. Court of Appeals issues opinion, reverses denial of motion to quash and suppress.

1978

May 1. Supreme Court of Michigan denies leave to appeal.

May 24. Petitioner's Petition for Writ of Certiorari docketed in United States Supreme Court.

October 2. Petitioner's Petition for Writ of Certiorari granted by United States Supreme Court.

(State of Michigan
In the Recorder's Court for the City of Detroit)

The People of the State of Michigan, Plaintiffs, vs
Gary Joseph DeFillippo, Defendant. File No. 76-07619.

EXAMINATION

Proceedings had and testimony taken in the above-entitled cause, before the HONORABLE DONALD L. HOBSON, Acting Judge of the Recorder's Court for the City of Detroit, Michigan, on September 30, 1976.

APPEARANCES: MS. JEANNE MARSON, Assistant Prosecuting Attorney, Appearing on behalf of the People. MR. THOMAS LOBE, Attorney-At-Law, Appearing on behalf of the Defendant.

PRELIMINARY EXAMINATION TRANSCRIPT

Detroit, Michigan
September 30, 1976.

PROCEEDINGS

(2) The Clerk: Case Number 76-07619, People versus Gary Joseph Defillippo, charged with the offense of possessing phensydedine.

Mr. Lobe: Defense is ready, your Honor.

GREGORY BEDNARK having been called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Ms. Marson:

Q. State your name and occupation, sir.

A. Gregory Bednark, Police, City of Detroit.

Q. Officer, were you on duty at about 10 o'clock in the evening on September 14th, 1976?

A. I was.

Q. At that time were you in the area of Rosemary and Dickerson in Detroit?

A. I was.

Q. How did you happen to be in that area?

(3) A. We received a radio run to investigate two people in the alley by the garage that appeared drunk.

Q. All right. You got to that alley, and what did you find?

A. As we pulled in, and as we were coming north on Dickerson, I observed two people by the alley.

Q. Do you see either of those people in Court today?

A. Yes, I do.

Q. Point him or them out.

A. Mr. Defillippo, sitting in the booth.

Ms. Marson: Let the record indicate the witness has pointed to and identified the defendant.

Q. (By Ms. Marson) What were these people doing when you first saw them?

A. As we pulled in the alley, the young man, the defendant, was standing by the rear of the garage, and the young lady was in the process of taking her pants down.

Q. Okay. What happened then?

A. I asked them what they were doing, and the young lady said she had to piss.

Q. What happened then?

A. I asked the gentleman for his identification. He (4) said — he told me that he was Sergeant Mash. I asked him —

Q. Indicating that he was a member of the Police Department?

A. That is correct. I asked him what his badge number was, and he said two something, I didn't catch the last number.

Q. What happened then?

A. I asked him again for identification, and he said, "I work for Sergeant Mash."

Q. What happened then?

A. At that time the female approached the car. I was still sitting in the driver's side of the car. I asked her for identification, and she opened the wallet and began tossing the contents of her wallet into the — in the car window on top of me, and all over the car.

At that time I exited the car and told her to pick up the stuff, and the young man would have to come into the station, because he didn't have any identification.

Q. What happened then?

A. I advised the young lady she would have to come (5) into the station for disorderly conduct, because there was a strong odor of alcohol about her.

Q. What happened then?

A. When I advised the young lady she would have to come into the station, she became loud and boisterous, hysterical, wouldn't let us investigate her purse. She grabbed the defendant and began kissing and hugging him.

Q. What happened then?

A. As we separated the two and I patted down the defendant, and he had what felt like marijuana on his right shirt pocket, and a package of cigarettes.

Mr. Lobe: Just a minute. Somebody just coughed.

Q. (By Ms. Marson) Start all over again. What did you do?

A. She was loud and boisterous and carrying on with the young man, and didn't want to go with us to the station.

So she was grabbing a hold of him, and we attempted to separate the two of them, and patted the defendant down. My partner was attempting to investigate the young lady's purse.

Q. All right. What developed during the pat down of the defendant?

(6) A. I felt some — what I believed to be marijuana underneath his — in his pocket, in his right breast pocket. There was a carton (sic) of cigarettes in the left breast pocket.

Q. And —

A. Because of her wild state, and not knowing if he would try to throw it away or destroy the evidence, I confiscated it at the scene and conveyed both, after we got her in handcuffs, to the station.

Q. Okay. What happened then?

A. At the station we took the marijuana, placed it on evidence, and inside the cigarette pack was one tinfoil packet. —

Q. Did you place that into evidence?

A. — Of suspected narcotics. Yes.

Q. Did you later put the tinfoil packet and its contents into a lock-sealed folder?

A. Yes, I did.

Q. What was the number of that lock-sealed folder?

A. I have to look at the P.C.R. Lock-sealed folder 100430.

Ms. Marson: Defense counsel informs me, your Honor, that for purposes (7) of examination only, he will waive the production of the evidence itself in Court today, and would stipulate that if the chemist were here, he would testify that he examined the contents of lock-sealed folder 100430, and found it to consist of .13 grams of phencyclidine.

The Court: Is that correct?

Ms. Marson: I have no further questions.

The Court: Is that correct, counsel?

Mr. Lobe: That is correct. For examination only, your Honor.

The Court: You may cross examine.

Cross Examination

By Mr. Lobe:

Q. Officer, what time did you receive a radio run?

A. Approximately 10:00 p.m.

Q. Were you alone?

A. No, I wasn't.

Q. Were you in uniform?

A. Yes, I was.

(8) Q. Who else was with you?

A. Donald Holifield. H-O-L-I-F-I-E-L-D.

Q. How long did it take you from the time you got the run until you got to the alley, if you know?

A. I would just be guessing, five minutes or so.

Q. Not more than 15?

A. No, I wouldn't think so.

Q. You testified that the woman appeared to be drunk. Did the man appear to be drunk?

A. I didn't say she appeared to be drunk. I just noticed a strong odor of alcohol. I didn't have her take a breath test.

Q. Did you notice a strong odor of alcohol on this gentleman?

A. No.

Q. Did he appear to slur his words?

A. No.

Q. Did he appear to be speaking plain and clear?

A. Yes, I believe so.

Q. Didn't he say he knew Sergeant Mash?

A. At first he said he was Sergeant Mash, and after we asked for his badge, he said he knew Sergeant Mash.

Q. Was your partner standing there when this happened?

(9) A. No, he was sitting on the passenger side in the car. I was in the driver's seat.

Q. Where was the gentleman?

A. Right at the driver's side window, leaning in the window with his elbows on the door.

Q. I see. When you asked him for identification, he did not have any identification?

A. That is correct.

Q. Is that why you arrested him?

A. I told him he would have to come into the station because he didn't have any identification.

Q. Pursuant to another power, it is illegal not to have identification?

A. City Ordinance.

Q. Did he appear to you to be under the age of 17?

A. I had no idea how old he was. After he told me he was Sergeant Mash, I didn't know what to believe.

Q. Then he was under arrest pursuant to the City Ordinance?

A. Yes.

The Court: He will have to answer yes or no.

The Witness: Yes.

Q. (By Mr. Lobe) Then you patted him down?

(10) A. That is correct.

Q. You felt what appeared to be marijuana?

A. That's correct.

Q. What does marijuana feel like, Officer?

A. Through my six and a half years on the job, you feel a plastic bag, and sensory perception of feeling the plastic bag inside the pocket, with the stems, leaves, seeds —

Q. What kind of pocket was it, Officer?

A. His right breast pocket.

Q. What kind of shirt, Officer?

A. It was a light — I don't know what the material — cotton maybe, light cotton.

Q. Could it be a blue denim levi jacket like blue jeans, but in a shirt?

A. No, it wasn't like blue jeans.

Q. Was it a blue denim? Was it a blue shirt?

A. Yes.

Q. It had a flap on the pocket?

A. That's correct.

Q. Over the flap you felt something soft?

A. That is partially correct.

Q. Okay. You believed it was marijuana?

A. That's correct.

(11) Q. Then what did you do next?

A. I was talking to the lady at the same time. I was asking her for identification.

Q. You looked in her purse?

A. Not at that time.

Q. You attempted to look in her purse?

A. She took the wallet out of her purse.

Q. What did you do with the wallet?

A. I didn't do anything. She started throwing I.D., and fling it into the car window.

Q. You were out of the car?

A. No, I was in the car at that time.

Q. You were in the car while you were talking to the woman, while you were patting him down?

A. No, not while I was patting him down. Sorry, I misunderstood.

Q. So you were out of the car?

A. When I patted him down, yes.

Q. Where was your partner?

A. Talking to the young lady.

Q. While your partner was talking to the young lady, you were patting him down, you were talking to the young lady also, is that your testimony?

A. We were then in the process of putting the handcuffs (12) on him and taking him in, getting her restrained.

Q. You were in the process of putting the handcuffs on him?

A. That's correct.

Q. For not having identification?

A. And placing him in the scout car, yes.

Q. Do you customarily handcuff everyone that you find on the street who does not produce sufficient identification?

Mr. Koldys: Objection to what is customary. All that is at issue is this factual situation.

Mr. Lobe: Your Honor, this is required under the law of People versus Charles D. Walker, to be legally admissible (sic) evidence. What I'm asking the officer is most material.

The Court: Ask him the question.

Q. (By Mr. Lobe) Is it your custom to handcuff anybody that goes in the car?

A. Everyone that is a prisoner, yes.

Q. He was under arrest for not having identification?

Mr. Koldys: Objection. Asked and answered, at least nine or ten times.

(13) The Court: I have heard it enough, counsel. Ask the next question.

Q. (By Mr. Lobe) Was he under arrest for having marijuana in his pocket?

A. We advised him after he identified himself as Sergeant Mash that he would have to come into the station.

Q. Then he corrected himself by saying he knew Sergeant Mash, isn't that true?

A. Corrected or whatever.

Q. He did tell you that, didn't he?

A. He told us that he worked for Sergeant Mash, after that.

Q. Do you know Sergeant Mash?

A. Not then, I did not.

Q. But you know him now?

A. Now I do.

Q. When he got to the station what did you do with him?

A. Took him to the cell block to be printed and processed.

Q. As part of that process did you advise him of his rights to post reasonable bail?

A. I don't know. It was handled by the clerk.

(14) Q. So you don't know what he was advised of?

Mr. Koldys: Immaterial. The search occurred on the street. It is an entirely irrelevant matter.

Argument

Q. (By Mr. Lobe) Where was the P.C.P. found, Officer?

A. Inside a Marlboro packet of cigarettes.

Q. Did he give you the cigarettes? Did he give you the pack?

A. It was in his left breast pocket.

Q. So when you patted him down you also felt that, is that correct?

A. I felt the cigarette pack.

Q. Then you took the cigarettes out of his pocket, is that correct?

A. That is correct.

Q. On the scene you looked into the pack?

A. I believe so, yes.

Q. Then you saw a tinfoil, is that correct?

A. That is correct.

Q. Then you looked into the tinfoil?

A. No.

Q. You didn't open the tinfoil until you got to the station?

A. That's correct.

(15) The Court: Anything further, counsel?

Mr. Lobe: No, Your Honor. Not of this witness.

Mr. Koldys: Step down, sir.

(Witness excused.)

Mr. Koldys: Move to admit the evidence and bind the defendant over on the charges contained in the complaint and warrant.

Mr. Lobe: Your Honor, I move —

The Court: You may respond, counsel.

Mr. Lobe: Your Honor, I move that the case be dismissed, the evidence suppressed, and the complaint and warrant quashed. This is the result of an illegal search and seizure.

Number one, if he was arrested under that City Ordinance, he had the right under *People versus Dixon* to post reasonable bail.

If the officer felt that he felt what appeared to be marijuana, I would (16) submit to your Honor that; number one that it is inherently incredible, because we don't know what is in a person's pocket.

Number two; *Terry* against *Ohio*, *Sibron* against *New York*, which is even more on point than *Terry*, an officer has a right to pat a person down when he is in fear of his safety. He didn't notice anything remotely like a weapon. He felt a soft pack.

It is no longer a frisk. It is a full blown search.

When he looked into that packet of cigarettes and saw that tinfoil, that was also a search.

I would cite to you two cases which I feel would be depositive of this matter, one called *People against Le Grange*, 40 Mich. Ap. Another case called *People against Harry Williams*, 63 Mich. Ap.

Your Honor, in that case there is an investigation. The case arose out (17) of an interlocutory appeal from *Oakland County*.

The officers were called to the scene by a manager of the hotel who saw a suspicious individual in the parking lot, much like these officers were called to the scene.

While the officer was talking to the man in the parked car, he asked him for identification. The man pulled a wallet out of his pocket. While the man was fumbling through the wallet the Officer then noticed that he had what appeared to be a license, because the corner of the license was sticking out of the wallet. Yet, the man had told him earlier just before that he did not have a license with him, but he had other identification.

The officer then grabbed the wallet, looked into the wallet, found some credit cards. The case arose from possessing stolen credit cards.

The Court of Appeals said that it was an improper search and seizure. Whether or not that wallet was taken by that officer, (18) it was taken without probable cause, but at best mere suspicion, that it did not come under the stop and frisk exception to the Fourth Amendment, and from all of the laws of this State, and under the Constitution, it was an illegal search.

Your Honor, it is directly on point, and I think it was an illegal search.

The Court: Any comments?

Mr. Koldys: No, your Honor. I think the chain of events shows that the officers' action was reasonable at all points.

Mr. Lobe: Your Honor, I respond that the reasonable test of the Fourth Amendment, and Article One of Section eleven of our Constitution, requires first that if the officer does not have a warrant, it is presumed that the search is illegal with some certain and specified narrow exceptions.

I don't believe that this officer's testimony here shows specified and narrow exceptions.

(19) He testified to a sixth sense after being on the police force for six and a half years. I submit that this officer's not omniscient, and that is not a reasonable and articulate suspicion under stop and frisk.

The Court: Mr. Lobe, the Court has heard your argument, but under the circumstances of this particular case I can see where it would appear to be reasonable for the officer to do what he did.

I will bind him over. You may bring this before the pre-trial Judge on motion, if you wish to proceed further.

Your pre-trial Judge is Judge Thomas L. Poindexter.
I will continue the \$1,000 personal bond.

(Hearing concluded.)

Certificate

State of Michigan
County of Wayne—ss.

I HEREBY CERTIFY that I reported stenographically the foregoing proceedings at the time and place hereinbefore set forth: That the same was thereafter reduced to typewritten form under my supervision: And that this is a full, true and correct transcription of my Stenotype notes.

/s/ Joanne C. Tobian,
Official Court Reporter.

State of Michigan,
October 9, 1976.

**ORDER GRANTING
INTERLOCUTORY APPEAL**

(State of Michigan
Court of Appeals)

(Filed June 2, 1977)

The People of the State of Michigan, Plaintiffs, vs
Gary Joseph DeFillippo, Defendant. File No. 76-07619.

At A Session Of The Court Of Appeals Of The State
Of Michigan, Held at the Court of Appeals in the City
of Grand Rapids on the 2nd day of June in the year of
our Lord one thousand nine hundred and
seventy-seven.

Present the Honorable Donald E. Holbrook, Jr.,
Presiding Judge. Robert B. Burns, Thomas M. Burns,
Judges.

In this cause an application for leave to appeal and a
motion for immediate consideration are filed by
defendant-appellant, and an answer in opposition
thereto having been filed, and due consideration
thereof having been had by the Court,

IT IS ORDERED that the motion for immediate
consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the application be,
and the same is hereby GRANTED on condition that all
acts required by subrules 803.2 and 803.5 be performed
within 10 days after the date of the Clerk's certification
of this order.

IT IS FURTHER ORDERED that in accordance with
GCR 1963, 816.6 the time for taking all steps on appeal
required under the rules is hereby REDUCED by
one-half and no extension of time shall be had except
upon order of the Court of Appeals.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals
of the State of Michigan, do hereby certify that the
foregoing is a true and correct copy of an order entered
in said court in said cause; that I have compared the
same with the original, and that it is a true transcript
therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the seal of said Court of Appeals at
Lansing this 2nd day of June in the year of our Lord
one thousand nine hundred and seventy-seven.

/s/ Ronald L. Dzierbicki
Clerk

OPINION

(State of Michigan
Court of Appeals)

(Filed December 6, 1977)

The People of the State of Michigan, Plaintiff-Appellee, v Gary De Fillippo, Defendant-Appellant.

BEFORE: T. M. Burns, P.J., and R. B. Burns and
W. R. Brown, JJ.

R.B. BURNS, J.

Defendant was charged with possession of a controlled substance, phencyclidene. MCLA 335.341(4) (b); MSA 18.1070 (41) (4) (b). Prior to trial he moved to suppress evidence obtained in a search of his person and to quash the information. The motion was denied and we granted an interlocutory appeal.

The facts indicate that two Detroit police officers received a radio call to investigate two allegedly drunken persons in an alley. Upon their arrival at the alley, the officers found defendant and a companion. The intoxicated companion was arrested for disorderly conduct. Defendant did not appear intoxicated, but when he was asked for his identification, he replied that he was Sergeant Mash, a Detroit police officer. When asked for his badge number, defendant replied that he was working for Sergeant Mash. Defendant was then arrested for failure to produce identification, handcuffed, and searched. Marijuana was found immediately, and phencyclidene was found later at the station in a pack of defendant's cigarettes.

It is defendant's theory that the Detroit ordinance which allows a police officer to arrest an individual for failure to produce identification is unconstitutional, that

the search incident to his arrest was therefore unlawful, and that the evidence must be suppressed. It is plaintiff's theory that we should avoid the issue of the constitutionality of the ordinance, because even if the ordinance is unconstitutional, the police officer's good faith reliance thereon would preclude application of the exclusionary rule. The purpose of the exclusionary rule is to deter unlawful police conduct, and "where official action was pursued in complete good faith, the deterrence rationale loses much of its force", *Michigan v Tucker*, 417 US 433, 447; 94 S Ct 2357; 41 L Ed 2d 182, 194 (1974). See *United States v Carden*, 529 F2d 443 (CA 5, 1976), *United States v Kilgen*, 445 F2d 287 (CA 5, 1971).

We cannot subscribe to plaintiff's theory. If, as defendant argues, the ordinance is void for vagueness, subject to arbitrary and discriminatory application, and used as a pretext for unlawful search and seizure, suppression of evidence obtained pursuant to a search incident to arrest thereon will deter unlawful police conduct, and the exclusionary rule should therefore apply. See *Powell v Stone*, 507 F2d 93, 98 (CA 9, 1974), *rev'd on other grounds*, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976), *United States ex rel. Newsome v Malcolm*, 492 F2d 1166, 1174-1175 (CA 2, 1974), *Hall v United States*, 459 F2d 831, 841-842 (DC Cir, 1972).

At the time of defendant's arrest, Detroit City Code § 39-1-52.3 read as follows:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to

identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity."

The ordinance has been slightly amended since defendant's arrest, but there are no significant changes.¹

The ordinance is void for vagueness.

First, it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden * * *." *United States v Harriss*, 347 US 612, 617; 74 S Ct 808; 98 L Ed 989, 996 (1954), see *Papachristou v City of Jacksonville*, 405 US 156; 92 S Ct 839; 31 L Ed 2d 140 (1972). An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime. Nor does the ordinance define which of today's numerous forms of identification will satisfy a police officer's desire for verifiable documents. This lack of specificity "encourages arbitrary and erratic arrests", *Papachristou v City of Jacksonville*, *supra*, by delegating to police officers the determination of who must be able to produce what kind of identification.

¹ The amendment, Detroit Ordinance No 158-H (October 19, 1976) makes clear that refusal to identify oneself is a crime. This was implicit in the ordinance as it read at the time of defendant's arrest, since the ordinance authorized arrest for failure to identify oneself.

Second, the ordinance seeks to make criminal conduct which is innocent. *Papachristou v City of Jacksonville*, *supra*, *Detroit v Sanchez*, 18 Mich App 399, 401-402; 171 NW2d 452, 453 (1969).

"Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion, — to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees." *Pinkerton v Verberg*, 78 Mich 573, 584; 44 NW 579, 582-583 (1889).

While police may under certain circumstances intrude upon a person's privacy by stopping him and asking questions, *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), there can be no requirement that the person answer. "[W]hile the police have a right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v Mississippi*, 394 US 721, 727n.6, 89 S Ct 1394, 1397n.6, 22 L Ed 2d 676, 681n.6 (1973). Accord, *Terry v Ohio*, *supra*, at 34, 20 L Ed 2d at 913 (White, J., concurring).

Third, the ordinance undercuts the probable cause standard of the Fourth Amendment. *Papachristou v City of Jacksonville*, *supra*; *People v Berck*, 32 NY2d 567, 300 NE2d 411, 347 NYS 2d 33 (1973). A police officer may make only a limited search of a person he has stopped on suspicion, and then only if he has reason to believe the person is armed and dangerous. *Terry v Ohio*, *supra*. The Detroit ordinance sanctions full searches on suspicion, without regard for dangerousness, of those persons whose activities fall within the vague parameters of the ordinance.

Since the ordinance is void, the search incident to arrest for violation of the ordinance was unlawful. The evidence should have been suppressed and the information quashed.

Reversed.

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(State of Michigan
In The Supreme Court)
(Filed May 1, 1978)

The People of the State of Michigan, Plaintiffs, vs
Gary Joseph DeFillippo, Defendant. File No. 76-07619.

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of April in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable Thomas Giles Kavanagh, Chief Justice. G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

State of Michigan—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of May in the year of our Lord one thousand nine hundred and seventy-eight.

/s/ Corbin R. Davis
Deputy Clerk

IN THE
SUPREME COURT FOR THE UNITED STATES
October Term, 1977

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

No. 77-1680

GARY DeFILLIPPO,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Gary DeFillippo, asks leave to proceed in forma pauperis in this matter as he was adjudged indigent in this matter by the state trial court (See attached) and an affidavit of indigency would be forthcoming.

DEFENDERS' OFFICE - LEGAL AID
AND DEFENDER ASSOC. OF DETROIT

BY:

Thomas M. Loeb
THOMAS LOEB (P 25913)
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ARTHUR J. TARNOW
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Detroit, MI 42826
963-4090

9

IN THE
SUPREME COURT FOR THE UNITED STATES
OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
GARY DeFILLIPPO,
Respondent.

No. 77-1680

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

- BRIEF FOR RESPONDENT IN OPPOSITION -

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported
80 Mich App 197, 262 NW2d 921 (1977) (App. A of Petition). The
Order of the Michigan Supreme Court denying leave to appeal is
reported at 402 Mich 921 (1978) (App. B of Petition).

JURISDICTION

The jurisdictional statement of the Petitioner are adequate.

QUESTIONS PRESENTED

- I. Whether the decision of the Michigan Supreme Court was based
on independent state grounds.
- II. Whether the decision below was clearly correct.
 - A. Whether there is no showing that the city ordinance is
constitutional.
 - B. Whether there are no facts which would support a finding that
the action of the state either complied with the ordinance or the
Constitution.

STATE OF MICHIGAN
IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

vs.

No.

7607619

CHARGE:

VASA-P

SWORN PETITION OF DEFENDANT

I have no money to hire a lawyer to defend me and petition the court to appoint counsel for my
defense.

Date: 9-21-76
Signed and sworn before me this date:

Defendant

Address

Phone

NOTICE TO APPOINTING JUDGE

The defendant was arraigned by me on the warrant and made a proper showing of indigency and
requested appointment of counsel at public expense.

I set examination for 9-30-76 Bond set at Personal

APPOINTMENT OF COUNSEL

I appoint Defendant as counsel for the defendant at public expense.

APPEARANCE OF COUNSEL

TO THE CLERK OF THE COURT:

Please enter my appearance as assigned counsel for the defendant.

Signature

Printed Name

Address

Telephone

Michigan State Bar No.

Petition, Order & Appearance of Assigned Counsel

RC Form #15

GREEN - Auditor for Payment

MUST BE PRESENTED FOR
PAYMENT WITHIN 30
DAYS AFTER SERVICES.

A TRUE COPY

HARRY Y. DUPLESSIS
RECORDER'S COURT

DEPUTY CLERK

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs-

Court of Appeals No. 77-20

GARRY DeFILLIPPO,

Lower Court No. 76-07619
Defendant-Appellant.

AFFIDAVIT OF APPOINTED COUNSEL

The following docket entries appear in the above case:

1. Date of appointment of counsel: 9/28/76;
2. Date of preliminary examination: 9/30/76;
3. Date of the filing of Motion to Quash the
Information and suppress the evidence: 10/6/76;
4. Date of Order Denying the Defendant's
Motion: 12/7/76;
5. Date of Order Staying Proceedings: 12/8/76;
6. Application for Leave to Appeal granted: 6/2/77;
7. Please note that the record upon which this
appeal is based - the preliminary examination transcript - has
been filed in this case.

A copy of the Order Appointing Counsel is attached.

DEFENDERS OFFICE LEGAL AID AND
DEFENDER ASSOCIATION OF DETROIT

BY: Thomas Loeb

THOMAS LOEB (P 25913)
Attorney for Defendant-Appell
462 Gratiot Ave.
Detroit, Michigan 48226
965-4384

Subscribed and sworn to before
me this 6 day of June, 1977

Ruth Ann Cawley

Notary Public, Wayne County, Michigan
My Commission Expires: 7/10/78

A TRUE COPY

HARRY Y. DUPLESSIS
RECORDER'S COURT

BY: Thomi Sant

DEPUTY CLERK

ORDINANCE

When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity. Detroit City Code § 39-1-52.3.

STATEMENT

The statement of facts of the Petitioner are accepted.

ARGUMENT

The issues presented by the Petition do not justify the granting of the Writ of Certiorari. The Petition does not mention that there were independent non-federal grounds for the decision of the Michigan Courts (Issue I, infra). The Petition does not demonstrate that the Ordinance ruled unconstitutional is constitutional (Issue II, A, infra). The Petition does not set forth facts, even if the city ordinance were ruled to be constitutional, sufficient to support the police conduct in this case. (Issue II, B, infra).

I. THE DECISION OF THE MICHIGAN SUPREME COURT WAS BASED ON INDEPENDENT STATE GROUNDS.

The Petitioner seeks Certiorari review of the decision of the Michigan Court of Appeals. (Pet. App. A). However, the review would be of the denial of leave to appeal by the Michigan Supreme Court. (Pet. App. B). The Order stated that Michigan Supreme Court was not persuaded that the issues raised should be reviewed. The Michigan Supreme Court did not issue an opinion. Thus, it is impossible to know whether or not their decision was because the Michigan Supreme Court agreed with the reasoning of the Michigan Court of Appeals or only the result. In either event the decision to deny leave to appeal is supported by independent stated grounds.

Where the decision is based on both state and federal grounds Certiorari review is inappropriate. Fox Film Corp. v Muller, 296 US 207; 56 Sct 183; 80 LEd 158 (1935).

It is important to note that the decision of the Michigan Court of Appeals cited at length from Pinkerton v Verberg, 78 Mich 573, 584; 44 NW2d 579, 582-3 (1889) to support its conclusion that an arrest without probable cause is a violation of the Constitution.

"Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion, -- to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guaranteed."
(Pet. A. 14-15).

In addition the Respondent in his brief at both the Michigan Court of Appeals and Michigan Supreme Court raised other issues not discussed by the state courts, which would supply independent state grounds for the result reached.¹

Thus, if this Court concluded that the Pinkerton decision

¹III. The Detroit Stop-Identification Ordinance should be declared void because as an emergency enactment it is pre-empted by the exclusive authority of the governor of the State of Michigan.

VI. Should this court constitutionally uphold the Stop-And-Identify Ordinance, the evidence should still be suppressed, as it was seized pursuant to an illegal search and not pursuant to a permissible limited pat-down or stop and frisk.

was not an adequate state grounds, then the Court should direct the Michigan Supreme Court to decide the other issues raised.²

II. THE DECISION BELOW WAS CLEARLY CORRECT.

A. THERE IS NO SHOWING THAT THE CITY ORDINANCE IS CONSTITUTIONAL

The reasons set forth by the Michigan Court of Appeals adequately demonstrate the unconstitutionality of the city ordinance. (See Pet. App. P 14-5). Neither the California case nor Terry address all of the grounds relied upon by the Michigan Court of Appeals in holding the city ordinance unconstitutional.

For the same reasons stated by the Michigan Court of Appeals, the city ordinance is unconstitutional.

B. THERE ARE NO FACTS WHICH WOULD SUPPORT A FINDING THAT THE ACTION OF THE STATE EITHER COMPLIED WITH THE ORDINANCE OR THE CONSTITUTION.

The facts set forth by the Petitioner are that two Detroit Police Officers received a radio call to investigate two allegedly drunken persons in an alley. Upon arrival at the alley the officers found respondent and a female who had her pants down. She was intoxicated; respondent did not appear to be so.
(Pet. App. p 4).

The city ordinance requires the police officer to have reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity
(Emphasis added).

The facts do not show anything that would allow the police officer to reasonably believe the behavior of the Respondent

² This alternate relief would avoid the result of Mosley v Michigan, 423 US 96, 96 Sct 321, 46 LEd2d 313 (1975) where after this Court reviewed the issue raised, the Michigan Court of Appeals reversed the conviction of the defendant on different grounds. People v Mosley (On Remand), 72 Mich App 289, 249 NW2d 393 (1976). The Michigan Supreme Court then affirmed that reversal on yet other grounds. People v Mosley (On Remand), 406 Mich 181, 254 NW2d 29 (1977).

warranted further investigation. There was no showing that the radio call was reliable. See People v Mosley, (On Remand), 400 Mich 818, 254 NW2d 29 (1977).

Even if the radio call concerning two allegedly drunken people in an alley was from a reliable informant, once the police arrived at the alley and saw that Respondent did not appear to be drunk they had no basis to further investigate him under the ordinance. It is important to note the other person at the scene was arrested immediately for being a disorderly person. Respondent was not arrested immediately.

Anything that the police officers did after they arrived at the scene and determined Respondent did not appear to be drunk was outside the authorization given by the ordinance. Thus, the argument of the Petitioner that the police officers were acting in good faith is without merit. They cannot be found to be acting in good faith on the basis that they were operating on the authority of an ordinance, when their conduct was not even authorized by that ordinance.

In addition any argument that the officers were relying on Terry v Ohio, 392 US 1; 88 Sct 1868; 20LED 2d 889 (1968) is destroyed by a close reading of Terry and its companion case of Sibron v New York, 392 US 40; 88 Sct 1889; 20 LED2d 917 (1968). The frisk allowed after a Terry stop is for the protection of the police officers. Thus, it must be limited to a search for weapons. There was no such limitation in this case, as the police had no reason to believe there was a weapon, especially after the initial frisk on the street.

This case is an example of why this Court should not and has not left the decision of whether or not a search is reasonable or not to the police officer on the street. Clearly a warrant could not have been obtained in this fact situation, because there was no probable cause to arrest. In addition there were no exigent cir-

cumstances present that would have justified an arrest without a warrant. To argue that the police officer was acting in good faith, because the ordinance was not yet held unconstitutional is not appropriate when the conduct of the police officers did not comply with either the ordinance or Terry-Sibron.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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Supreme Court, U. S.

FILED

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MICHAEL R. DAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

—•—
No. 77-1680
—•—

THE STATE OF MICHIGAN,
Petitioner,

v.

GARY DeFILLIPO,
Respondent.

—•—
BRIEF FOR THE PETITIONER
—•—

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1680

THE STATE OF MICHIGAN,
Petitioner,

v.

GARY DeFILLIPO,
Respondent.

BRIEF FOR THE PETITIONER

OPINION BELOW

The Opinion of the Michigan Court of Appeals, Division I, (Petition for Writ of Certiorari, Appendix A, pp 12-15), is reported at 80 Mich App 197; 262 NW2d 921 (1977).

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on December 6, 1977. The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal was entered May 1, 1978. The Petition for Writ of Certiorari was docketed on May 24, 1977, and granted on October 2, 1978. The jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

I

WHETHER AN ARREST MADE IN GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID ORDINANCE IS A VALID ARREST, REGARDLESS OF THE ULTIMATE VALIDITY OF THE ORDINANCE?

II

IS AN ORDINANCE WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO *TERRY v OHIO*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) TO REFUSE TO IDENTIFY HIMSELF AND/OR REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY CONSTITUTIONAL?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Two Detroit Police Officers received a radio call to investigate two allegedly drunken persons in an alley. (R,3) Upon arrival at the alley the officers found respondent and a female who had her pants down. (R,3) She was intoxicated; respondent did not appear to be so. When asked for identification respondent replied that he was Sergeant Mash, a Detroit Police Officer. When asked his badge number he then stated that he worked for a Sergeant Mash. (R,4) He was arrested for failure to produce identification, handcuffed, and searched, the search producing marijuana. (R,4-5, 9) At the station phencyclidine was found in a pack of defendant's cigarettes. (R,6-7)

Respondent was charged with possession of phencyclidine. MCLA 335.341(4)(b); MSA 18.1070 (41)(4)(b). A motion to suppress evidence was denied, and on interlocutory appeal the Michigan Court of Appeals held the ordinance under which respondent was initially arrested unconstitutional (Detroit City Code 39-1-52.3). The court also rejected petitioner's

argument that the officer's good faith reliance on the ordinance which had not been declared unconstitutional at the time of the arrest rendered the arrest lawful. On May 1, 1978, the Michigan Supreme Court denied petitioner's application for leave to appeal.

SUMMARY OF ARGUMENT

The Michigan Court of Appeals, relying on *Powell v Stone*, 507 F2d 93 (CA 9, 1974), held that an arrest in good faith reliance on a penal ordinance which is subsequently declared unconstitutional is an unconstitutional arrest. The court also held Detroit City Code 39-1-52.3 unconstitutional.

Petitioner contends that the arrest was not unconstitutional, as it was completely reasonable given the facts and circumstances known to the officer at the time. The officer did not and could not know that the penal ordinance could subsequently be declared unconstitutional.

It is also petitioner's position that if the arrest was unconstitutional, the exclusionary rule ought not be applied. No legitimate purpose would be served by excluding the evidence, and failure to exclude it would not have the effect of inducing lawless police conduct.

It is further petitioner's contention that the ordinance is not unconstitutional. It is within the police power of the legislature to require that persons validly stopped for investigation answer an investigative inquiry as to identity. Moreover, the ordinance is not vague. The Michigan Court of Appeals thus erred in holding that the phencyclidine must be suppressed.

ARGUMENT

I.

AN ARREST MADE IN GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID PENAL ORDINANCE IS A VALID ARREST, REGARDLESS OF THE ULTIMATE VALIDITY OF THE ORDINANCE.

A. The Opinion Below

In its opinion below, the Michigan Court of Appeals held that Detroit City Code 39-1-52.3 was void for vagueness.¹ Citing *United States v Harris*, 347 US 612; 74

¹ At the time of defendant's arrest, the ordinance read:

When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity.

The ordinance was amended on October 19, 1976, beginning with the second sentence:

It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to refuse to produce verifiable evidence, written or oral, of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity. Refusal to cooperate with the police officer by not providing verifiable evidence of his identity, or by not accompanying the police officer to the nearest precinct in order to verify his identity, shall be deemed an unlawful act.

Detroit City Code 1-1-7 provides that unlawful acts are punishable by 90 days or \$500.00 fine.

S Ct 808; 98 L Ed 989 (1954), and *Papachristou v City of Jacksonville*, 405 US 156; 92 S Ct 839; 31 L Ed 2d 140 (1972), the court held that the ordinance "fails to give a person of reasonable intelligence fair notice that his contemplated conduct is forbidden" in that 1) a citizen cannot know when he has been validly stopped pursuant to *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and 2) a citizen cannot know what verifiable evidence of identity is. *People v DeFillippo*, 80 Mich App 197, 201; 262 NW2d 921, 923 (1978).

Secondly, the court held that the ordinance "seeks to make criminal conduct which is innocent." Quoting from *Davis v Mississippi*, 394 US 721, 727, fn 6; 89 S Ct 1394; 22 L Ed 2d 676 (1973), that (W)hile the police have a right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer," the court impliedly held that neither can the legislature require that persons stopped pursuant to *Terry* answer an inquiry regarding identity.

Thirdly, the court held that the "ordinance undercuts the probable cause standard of the Fourth Amendment" by sanctioning "full searches on suspicion."² *DeFillippo*, at 924.

Finally, preliminarily to its discussion of the ordinance, the court, citing *Powell v Stone*, 507 F2d 93, 98 (CA 9, 1974), rejected petitioner's argument that the question of the constitutionality of the ordinance should

² As will be developed subsequently, the search is not incident to the stop, but to the arrest for violation of the ordinance, here, by failing to identify.

not be reached because the officer's good faith reliance on the ordinance should preclude application of the exclusionary rule in any event. *DeFillippo*, at 923. It is petitioner's position that the Michigan Court of Appeals erred in reaching the question of the constitutionality of the ordinance, for an arrest made in good faith reliance on a penal ordinance which is subsequently declared unconstitutional is a valid arrest nonetheless; further, the court erred in holding the ordinance unconstitutional.

B. No Constitutional Violation Occurred

This Court has recently made plain that there is a distinction between "... what is necessary to establish a statutory or constitutional violation and what is necessary to support a suppression remedy once a violation has been established." *Scott v United States*, — US —; 56 L Ed 2d 168, 176 (1978). The position of the Government, which formed the basis of the Court of Appeals decision, 516 F2d 751, 757 (CA DC, 1975), was held by this Court to embody the "proper approach":

In view of the deterrent purposes of the exclusionary rule, consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has been established. But the existence vel non of such a violation turns on an objective assessment of the officer's action in light of the facts and circumstances confronting him at the time. 56 L Ed 2d at 176-177.

In the instant case, then, does an "objective assessment of the officer's action in light of the facts and circumstances confronting him at the time" demonstrate that the officer unreasonably seized the person of respondent? The officer was aware of a presumptively valid penal ordinance, the enforcement of which was his duty. A violation of that ordinance occurred in his presence: respondent did not state his identity when requested, and in fact gave a false answer. The circumstance *not* known to the officer was that some months subsequent the Michigan Court of Appeals would declare that the ordinance which respondent violated was unconstitutional. It cannot be said that a circumstance not known to the officer at the time of arrest (and of which he cannot properly be charged with knowledge) related back to his conduct, rendering the seizure of respondent's person unreasonable under the Fourth Amendment.³

In *Brown v Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975), Justice Powell, joined by Justice Rehnquist, stated in an opinion concurring in part that

³ In *People v Carpenter*, 69 Mich App 81; 244 NW2d 338 (1976) defendant's auto was stopped after an officer observed a rifle case. At that time MCLA 750.227 had been construed to prohibit the carrying of rifles. The Michigan Supreme Court subsequently held that the statute only applied to stabbing weapons. *People v Smith*, 393 Mich 432; 225 NW2d 165 (1975). Carpenter was convicted for carrying handguns in a motor vehicle for pistols found pursuant to his arrest. He attacked his conviction on appeal by alleging his initial arrest was improper, citing *Smith*. The Court of Appeals held that only the facts, circumstances and information known to the officer at the time of the arrest could be considered and affirmed the conviction. *DeFillippo* cannot be squared with *Carpenter*.

the exclusionary rule ought not be applied to "technical" violations of the Fourth Amendment; for example, where "... officers in good faith arrest an individual ... pursuant to a statute that subsequently is declared unconstitutional, see *United States v Kilgen*, 445 F2d 287 (CA 5, 1971)." 422 US at 611. Petitioner agrees that the exclusionary rule should not be applied where its purpose is not served (See C, *infra*), but submits that an arrest pursuant to a presumptively valid penal statute or ordinance which is subsequently declared unconstitutional is not even a "technical" violation of the Fourth Amendment; rather, it is no violation at all. *Scott v United States*, *supra*. That a court eventually holds, in a proper case, that the person arrested and held to answer in a criminal proceeding for violation of an ordinance or statute may not be convicted and incarcerated for the violation of that ordinance or statute because of a due process defect in the legislation does not mean, and should not mean, that the initial seizure of the person was unreasonable under the Fourth Amendment.

In both *United States v Kilgen*, 445 F2d 287 (CA 5, 1971) and *United States v Carden*, 529 F2d 443 (CA 5, 1976), the Fifth Circuit declined to discuss the constitutionality of the penal ordinances under which the respective defendants were arrested because in neither case was the defendant being prosecuted for violation of the ordinance. Had they been so prosecuted, said the court, then an attack on the ordinances would have been appropriate, but an attempt to exclude evidence seized pursuant to an arrest under the ordinances was not appropriate, for "This

court has held more than once that an arrest made in good faith reliance on a statute not yet declared unconstitutional is *valid*, regardless of the actual constitutionality of the ordinance" (emphasis added). *United States v Carden*, *supra* at 445. In the instant case, respondent was not being prosecuted for violation of the ordinance. The question of its constitutionality thus should not have been reached, as the seizure of his person in enforcement of the ordinance was in any event reasonable under the Fourth Amendment.⁴

Petitioner's position, then, is that a ruling that a penal ordinance or statute is unconstitutional does not render unreasonable under the Fourth Amendment a seizure of a person to answer for a violation of the ordinance or statute accompanied prior to the ruling. Further, the constitutionality of penal ordinances and statutes is appropriately litigated in prosecutions for their violation. The question then arises, what is to be made of cases such as *Almeida-Sanchez v United States*, 413 US 266; 93 S Ct 2535; 37 L Ed 2d 596 (1973), where a stop and search was held unreasonable under the Fourth Amendment though achieved pursuant to a statute which had not been declared unconstitutional at the time?⁵ Petitioner submits that the answer lies in the nature of the statute involved in *Almeida-Sanchez*.

⁴ See Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 Journal of Criminal Law and Criminology, (Dec. 1978, pp. 13-18 of draft).

⁵ See also *Sibron v New York*, 392 US 40; 88 S Ct 1889; 20 L Ed 2d 917 (1968); *United States v Brignoni-Ponce*, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975).

The statute involved, 8 USC 1357a, allowed warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States" as authorized by regulations to be promulgated by the Attorney General. The Attorney General defined "reasonable distance" to be "within 100 air miles from any external boundary of the United States." A search of an auto in *Almeida-Sanchez* pursuant to the statute revealed marijuana, and Almeida-Sanchez was prosecuted on a marijuana charge. 21 USC 176a. This Court held that the statute authorized unconstitutional searches and seizures, and overturned the conviction. *Almeida-Sanchez* is distinguishable from the case at bar.

8 USC 1357a is *not* a penal statute, unlike the ordinance involved in the present case.⁶ Congress, in enacting 8 USC 1357a, was thus not engaged in its exclusive function of defining crime and ordaining punishment. *United States v Wiltberger*, 5 Wheat 76, 95; 5 L Ed 37, 42 (1820). The Fourth Amendment seizure of Almeida-Sanchez was not to hold him to answer for the violation of a penal statute; rather, the purpose of the statute was simply to authorize the seizure (and search). Petitioner agrees with *Almeida-Sanchez* that "... no Act of Congress can authorize a violation of the

⁶ As noted in footnote 1 of the opinion of the Michigan Court of Appeals, the October 19, 1976 amendment to the ordinance only makes clear that which was implicit in the ordinance at the time of defendant's arrest: that refusal to identify is a crime. The detention portion of the ordinance does not render the ordinance an ordinance of criminal procedure, as in *Almeida-Sanchez*, rather, it is simply the only sensible alternative to the ordinary procedure of issuing an appearance ticket, employed, when the violator's identity is known, for most ordinance violations.

Constitution." 413 US at 272. Where the purpose of a statute is to authorize seizures and/or searches and not to define and regulate conduct criminally, and that authorization is in conflict with the Fourth Amendment, then a seizure or search pursuant to the statute is unreasonable and a violation of the Fourth Amendment, despite the fact that the police acted pursuant to its authorization in good faith. But this is a completely different matter from the case at bar. Here respondent was observed (or heard) to violate a penal ordinance, and was arrested to be held to answer for the violation. The legislature did not undertake solely to provide procedures for the seizures of persons, but to define conduct it wished to make criminal. In sum, a seizure of a person to answer for a crime does not become unreasonable if a court later holds that a person cannot constitutionally be convicted and imprisoned for violation of that statute; whereas, a seizure of the person not to answer for a crime but pursuant to a statute which authorizes the seizure itself is unreasonable if the procedure allowed by the statute is inconsistent with the Fourth Amendment.⁷ In the former case, which is the instant case, there is no constitutional violation in the arrest and seizure of items incident to the arrest. *Scott v United States*, *supra*. Where prosecution is not for violation of the ordinance, the question of its constitutionality should not be reached, as it is irrelevant. The phencyclidine in the case at bar was not seized in violation of the Fourth Amendment. The decision of the Michigan Court of Appeals should be reversed.

⁷ Whether suppression of evidence is then the appropriate remedy is another question, see *C*, *infra*.

C. Even If A Constitutional Violation Occurred, The Exclusion Of The Evidence Is Inappropriate Where The Officer Acted in Good Faith Reliance On An Ordinance Not Yet Declared Unconstitutional

Should this Court hold that an arrest pursuant to an ordinance which is subsequently declared unconstitutional is a seizure of the person in violation of the Fourth Amendment, then "consideration of official motives" comes into play in determining whether application of the exclusionary rule is appropriate. *Scott v United States*, *supra*. Petitioner agrees with the opinion of Justice Powell in *Brown v Illinois*, *supra*, that there is "... no legitimate justification for depriving the prosecution of reliable and probative evidence" in cases of "technical" violations of the Fourth Amendment, such as, where "officers in good faith arrest an individual ... pursuant to a statute that subsequently is declared unconstitutional. ..." 422 US at 611.⁸

This Court has made plain that the exclusionary rule is not a personal constitutional right of the person aggrieved, its purpose being to deter, not repair. *United States v Calandra*, 414 US 338, 348; 94 S Ct 613, 620; 38 L Ed 2d 561 (1974). Whether or not a suppression remedy should be applied after a constitutional violation has been demonstrated, *Scott v United States*, *supra*,

⁸ See also Chief Justice Burger's dissent in *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971), criticizing the exclusionary rule because of its undifferentiating treatment of gross and technical violations of the Fourth Amendment.

depends on whether exclusion of the evidence would deter willful or negligent police conduct which violated some right of the accused. See *United States v Janis*, 428 US 433, 446; 96 S Ct 3021; 49 L Ed 2d 1046 (1976): "The Court ... has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct' " (emphasis added), and *Stone v Powell*, 428 US 465, 486; 96 S Ct 3037; 49 L Ed 2d 1067 (1976): "The primary justification for the exclusionary rule ... is the deterrence of police conduct that violates Fourth Amendment rights." Accord *Brown v Illinois*, *supra*, opinion of Justice Powell. The test is well-stated in *United States v Peltier*, 422 US 531; 95 S Ct 2313; 45 L Ed 2d 374 (1975), which held *Almeida-Sanchez*, *supra*, to be prospective:

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment ... we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car. (emphasis added) 422 US at 542.

Keeping in mind the observation in *Calandra*, 414 US at 348, that "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," and that in *Michigan v Tucker*, 417 US 433, 446; 94 S Ct 2357; 42 L Ed 2d 182 (1974), that "where the official action was pursued in

complete good faith . . . the deterrence rationale loses much of its force," it becomes apparent that where "the deterrence rationale of the exclusionary rule does not obtain" there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Brown v Illinois, supra*. An arrest made in good faith reliance on a statute or ordinance which is later declared unconstitutional is not conduct which is deterred by the exclusionary rule, nor should it be the policy of the Court to attempt to encourage police officers, who are not "legal technicians," *Draper v United States*, 358 US 307, 313; 79 S Ct 329; 3 L Ed 2d 327 (1959), to make personal ad hoc legal judgments on the constitutionality of penal statutes or ordinances before undertaking to enforce them.⁹

As indicated previously, the Fifth Circuit has embraced the proposition urged by petitioner. In *United States v Kilgen, supra*, the court held that

No legitimate interest would be served by excluding the confession to the separate crime of stealing postage stamps because we now find the vagrancy ordinance invalid. We therefore hold

⁹ In his dissent in *Peltier*, Justice Brennan asserts that the majority assumes that the deterrence rationale is based on punishment of individual officers, whereas in fact "the exclusionary rule, focused upon general, not specific, deterrence, depends not upon threatening a sanction for lack of compliance but upon removing an inducement to violate Fourth Amendment rights." 422 US at 558. But plainly in cases such as the instant one the only "inducement" offered by non-application of the exclusionary rule is that officers will be induced to enforce the law, which is their duty. Moreover, in many cases prior case law supported the officer's conduct — would application of the exclusionary rule be appropriate to deter courts from misconstruing the Constitution?

that the confession to the separate offense was admissible because it was obtained while Kilgen was detained and charged in good faith reliance on an ordinance not yet held invalid.

See also *United States v Carden, supra*. The Ninth Circuit has taken the opposite view. *Powell v Stone*, 507 F2d 93 (CA 9, 1974), rev'd on other grounds 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976). Recognizing that deterrence of police misconduct is not served by excluding evidence when officers arrest in good faith pursuant to a presumptively valid statute, the court found the remedy of suppression appropriate because ". . . the public interest is served by deterring legislators from enacting such statutes." 507 F2d at 98. Such a rationale for application of a suppression remedy has never been articulated by this Court; indeed, it runs directly counter to this Court's statements in *Janis, Powell*, and *Tucker* that the purpose of the exclusionary rule is to deter future unlawful police conduct. See also *Amsterdam, Perspectives On the Fourth Amendment*, 58 Minn L Rev 349, 369 (1974): ". . . the regulation of police behavior is what the Fourth Amendment is all about" (emphasis added). Applying the test of *Peltier, supra*, to the instant case, it is clear that application of the exclusionary rule serves no valid purpose.

The question again arises, what of *Almeida-Sanchez*? If "evidence obtained from a search should be suppressed only if it can be said that the law enforcement official had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment," *Peltier, supra*, then was *Almeida-Sanchez* itself wrongly decided (see dissent of Justice Brennan in *Peltier*, 422 US at 554)? Had the

statute in *Almeida-Sanchez* been a penal statute, the answer would be yes, for the constitutionality of penal statutes should be left to prosecutions for their violation. But *Almeida-Sanchez* involved a statute of criminal procedure, as it were, and not a penal statute. It could thus never be challenged in a criminal prosecution. Of course, it still remains true that the officers in *Almeida-Sanchez* acted in as good faith as those in *Peltier*. That *Almeida-Sanchez* received favorable treatment is a result that obtains in every case of prospectivity. It was necessary to reward *Almeida-Sanchez* because if there were no benefit to be gained from a challenge to the statute it would forever remain unreviewable, not being a penal statute. *Peltier* was not treated unfairly, *Almeida-Sanchez* was treated favorably as a necessary function of judicial review.

The Ninth Circuit also justified applying the exclusionary rule where an arrest was made in good faith reliance on an ordinance which was subsequently declared unconstitutional by relying on the "imperative of judicial integrity." 507 F 2d at 98. Petitioner submits that the Ninth Circuit wrongly applied that doctrine. In *Weeks v United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1913) this Court held that evidence seized in violation of the Fourth Amendment was inadmissible in federal trials. But it must be noted that *Weeks* did not involve a factual setting where it could be argued that the officer acted in good faith reliance on legislative or judicial pronouncements. The United States Marshall simply searched *Weeks*' home without a search warrant or arrest warrant. He acted "without sanction of law." 232 US at 393. Similarly, in *Elkins v United States*, 364 US 206; 80 S Ct 1437; 4 L Ed 2d 1669 (1960), in rejecting

the "silver platter" doctrine, this Court stated that the federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold" (emphasis added). 364 US at 223. But as recognized in *Peltier* and *Stone v Powell*, *supra*:

... judicial integrity is 'not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held the conduct of the type engaged in by the law enforcement officials is not permitted under the Constitution.' 422 US at 538; 428 US at 485, fn2.

When a court admits evidence seized in good faith reliance on an ordinance which is subsequently declared unconstitutional, it is simply not acting as accomplice to a "willful" violation of the Constitution (if indeed there is any violation of the Constitution at all, see *B supra*). See also *Fuller v Alaska*, 393 US 80; 89 S Ct 61; 21 L Ed 212 (1968); *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965).

As further support for the proposition that the "imperative of judicial integrity" does not operate to exclude evidence seized in all cases of Fourth Amendment violations, petitioner would point out that evidence seized by private persons in violation of the Fourth Amendment is not excluded in criminal trials. *Burdeau v McDowell*, 256 US 465; 41 S Ct 574; 65 L Ed 1218 (1921). The requirement of standing to object is another example of a situation wherein a Fourth Amendment violation does not result in suppression. *Brown v United States*, 411 US 223; 93 S Ct 1565; 36 L Ed 2d 208 (1973). Note should also be taken of the fact that

illegally seized evidence may be used for impeachment purposes. *Walder v United States*, 347 US 62; 74 S Ct 354; 98 L Ed 503 (1954); *Harris v New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971). In short, the "imperative of judicial integrity" is a corollary to the principle of deterrence. The integrity of the court is not offended where the court is not sanctioning and thereby encouraging "willful" violations of the Constitution. *Elkins, supra*.

In conclusion, petitioner would point out that this Court has held that the decision of whether the exclusionary rule should apply to a given situation involves a balancing process:

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. *Before we penalize police conduct therefore, we must consider whether the sanction serves a valid and useful purpose* (emphasis added). *Michigan v Tucker*, 417 US at 446.

... when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence. *Michigan v Tucker*, 417 US at 450.

Professor Amsterdam has stated the need to limit the exclusionary rule to situations where its deterrent function is served thusly:

As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more

should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest...." *Amsterdam, Search, Seizure and Section 2255: A Comment*, 420 Pa L Rev 378, 388-389 (1964).

To exclude the truth in a case such as this one, where there is involved no insolent use of authority, and where there is an absence of an incontestable compensating gain, is to inflict "gratuitous harm on the public interest," and is itself an affront to judicial integrity.

II.

AN ORDINANCE WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO *TERRY v OHIO*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) TO REFUSE TO IDENTIFY HIMSELF, AND/OR TO REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY, IS NOT UNCONSTITUTIONAL.

Before analyzing the question of the constitutionality of the ordinance here involved, petitioner would point out that the Michigan Court of Appeals erred in reaching the issue. As argued in Argument I, the admissibility of the phencyclidene seized in this case does not depend on the constitutionality of the ordinance, for, as explained in Argument I, the evidence should be admissible as the arrest was valid, regardless of the constitutionality of the ordinance. However, since the Michigan Court of Appeals did pass on the question, and the Michigan Supreme Court declined to review that holding, petitioner believes a ruling by this Court on the question is appropriate.

A. The Police Power

Before reaching questions such as vagueness and self-incrimination, a fundamental question must first be discussed; that is, assuming for the moment the validity of the ordinance in all other respects, is the ordinance violative of due process as being beyond the police power of the state due to the nature of the conduct it attempts to prohibit? Petitioner submits that it is not.

The question is, what are the limitations on the legislative exercise of the police power, or, more particularly, what is the function of the courts in reviewing a legislative exercise of the police power? First, it must be observed that courts should and do exercise great restraint in this area. In an earlier era the Court did not exercise such restraint, see e.g. *Lochner v United States*, 198 US 45; 25 S Ct 539; 49 L Ed 937 (1905); *Coppage v Kansas*, 236 US 1; 35 S Ct 240; 59 L Ed 441 (1915); *Adkins v Children's Hospital*, 261 US 525; 43 S Ct 394; 67 L Ed 785 (1923); however, *Nebbia v New York*, 291 US 502; 54 S Ct 505; 78 L Ed 940 (1934), heralded a new attitude, as evidenced by the statement that "the legislature is primarily the judge of the necessity of such an enactment (a penal statute prohibiting the sale of milk under established prices), that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." 291 US at 537-538. That this policy of restraint still prevails is demonstrated by the more recent case of *Griswold v Connecticut*, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965). There, though holding the statute in question unconstitutional as in conflict with the penumbral right of privacy, the Court

specifically refused to be guided by *Lochner v United States*, *supra*, saying, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 US at 482. Thus, keeping in mind the paramount role of the legislature in determining the wisdom and need for the ordinance in question, that all presumptions are to be indulged in favor of its validity, and that the ordinance may not be annulled unless "palpably in excess of legislative power," petitioner will discuss whether the ordinance exceeds the police power because of the nature of the conduct it seeks to prohibit.

The principles governing the limits of the police power are stated in *Lawton v Steele*, 152 US 133, 137; 14 S Ct 499; 38 L Ed 385 (1894) (referred to as the "classic statement" of the rule in *Goldblatt v Town of Hempstead*, 369 US 590, 594-595; 82 S Ct 987; 8 L Ed 2d 130 (1962)):

To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

See also *Carolene Products v Thomson*, 276 Mich 172; 267 NW 608 (1936); *Grubaugh v City of St. Johns*, 384 Mich 165; 180 NW2d 801 (1970); *People v Poucher*, 398 Mich 316; 247 NW2d 798 (1976); 2 Cooley, *Constitutional Limitations* (8th ed), p. 733; 16 Am Jur 2d, *Constitutional Law*, sec 277 et seq. It has also been stated that, because of the presumption of validity, "... if the relation between the statute and the public

welfare is debatable, the legislative judgment must be accepted." *Grocers Dairy Co v Department of Agriculture Director*, 377 Mich 71, 76; 138 NW2d 769, 770 (1966). Because of the wide discretion given the legislature, and the presumption of validity, one commentator has suggested that this Court has "all but abandoned the practice of invalidating criminal statutes on the basis that they bear no substantial relation to injury to the public," preferring to be "on more solid ground" in ruling, if a statute is to be invalidated, that it violates due process "on the more specific ground that it intrudes upon the protections of the Bill of Rights. . . ." LaFave and Scott, *Criminal Law*, sec. 20, p. 138.

In the instant case it is plain that if the public interest is served, it is served generally. Petitioner submits that there is a public interest in requiring persons to respond to questions, at least to the extent of identity, when the officer has a "reasonable suspicion that criminal activity is afoot." *Terry v Ohio*, *supra*. *Terry* allows a forcible stop, a Fourth Amendment seizure of the person, under appropriate circumstances. But what is the purpose of the stop if not to investigate?

One general (governmental) interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. (emphasis added). *Terry v Ohio*, 392 US at 22.

And how did officer McFadden investigate in *Terry*? He "approached the three men, identified himself as a

police officer, and asked for their names" (emphasis added). 392 US at 6-7. When the men "mumbled something" in response, Terry was seized, patted down, and a pistol found. Given all the circumstances observed by officer McFadden, Chief Justice Warren wrote that "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." 392 US at 23.¹⁰

If the purpose of the stop is for investigation, how is the investigation to occur but by the asking of questions, such as identity, as done by officer McFadden? In his concurring opinion in *Terry*, Justice White observed that while under appropriate circumstances a person may be "briefly detained against his will while pertinent questions are directed to him" he is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest. . . ." 392 US at 34. While refusal to answer may furnish no basis for an arrest in the absence of specific authority to arrest, this is an entirely different matter from whether the legislature has the power to make refusal to answer a crime. If it does, then refusal to answer does furnish a basis for arrest, not under the officer's right under *Terry* to briefly detain persons for investigatory purposes, but to hold the person to answer for the crime he has committed (and here the

¹⁰ See also *Adams v Williams*, 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972):

A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time (emphasis added).

detention is only until identification is learned; the defendant is then released to appear on the ordinance violation).

Laying aside all other questions, petitioner submits that the legislature may make failure to answer an inquiry as to identity a crime under circumstances where there exists a reasonable suspicion that criminal activity is afoot in that the ordinance does serve the public welfare. If a Fourth Amendment seizure of the person for investigatory purposes is permissible under appropriate circumstances because in balancing the interests involved the intrusion is justified by the governmental interest "of crime prevention and detection," 392 US at 22, then requiring an answer to the investigative inquiry, at least as to identity, is justified by the same public interest of crime prevention and detection, and is thus within the police power. See *People v Solomon*, 33 Cal App 3d 429; 108 Cal Rptr 867 (1973), *cert denied* 414 US 951 (1974), where, upholding a disorderly person statute with elements 1) refusal to furnish identity, 2) by one loitering on the streets, 3) under circumstances that infringe upon the public safety, the court stated:

It is within the bounds of legislative power to proscribe conduct that interferes with prevention and detection of crime, where the proscription is consistent with constitutional right . . . We find the legislative power employed here to compel

identification is consistent with constitutional right. 108 Cal Rptr at 871.¹¹

¹¹ The Uniform Arrest Act, Sec. 2, while not making failure to identify subsequent to a *Terry* stop a criminal act, does authorize a two hour detention:

- 1) A peace officer may stop any person abroad whom he has reasonable grounds to suspect is committing or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.
- 2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
- 3) The total period of detention provided by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

The Act has been adopted in a number of states, e.g. Del Code Anno title 11, sec. 1902; NH Rev Stat, sec. 594:2; General Laws of RI, sec 12-7-1; Anno Mo Stat, sec 84.710.

Also of importance is the Model Penal Code, sec 250.6, which is a penal statute:

A person commits a violation if he loiters or prowls in a place at a time, or in a manner not usual for law-abiding individuals, under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor . . . *refuses to identify himself* . . . (emphasis added).

See also Model Code of Pre-Arrestment Procedure, Tentative Draft no. 1, sec. 2:02 (1) through (3).

B. Self-Incrimination

Though not the basis for the opinion below, an issue raised below was that to make failure to identify oneself subsequent to a *Terry* stop criminal was to compel the person stopped to be a witness against himself, in violation of the Fifth Amendment. Petitioner submits that the requirement is not in conflict with the Fifth Amendment, as the information requested is non-testimonial.

Cal Penal Code, Sec. 647e provides that a person who commits the following act is guilty of the misdemeanor of disorderly person:

e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

A compulsory self-incrimination argument was raised against the identification requirement and rejected on several occasions by the California Court of Appeals. First, it is clear that the privilege is a bar against compelling *testimonial* communications, and is no bar against establishing identity, even where establishment of identity might lead to criminal charges. See *United States v Dionisio*, 410 US 1; 93 S Ct 764; 35 L Ed 2d 67 (1973) (voice exemplars); *Schmerber v California*, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966) (blood sample); *Gilbert v California*, 388 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967) (handwriting exemplars); *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)

(lineup, and speak words allegedly spoken by robber).¹² As stated in *Wade*, the accused was required "to use his voice as an identifying physical characteristic, not to speak his guilt." 388 US at 222-223. See also *California v Byers*, 402 US 424; 91 S Ct 1535; 29 L Ed 2d 9 (1971). The instant case is distinguishable from cases such as *Marchetti v United States*, 390 US 39; 88 S Ct 697; 19 L Ed 2d 889 (1968) and *Grosso v United States*, 390 US 62; 88 S Ct 709; 19 L Ed 2d 906 (1968) in that the statutes in those cases required more than a mere statement of identity, instead requiring the giving of information the *content* of which could be used against the provider of the information in a criminal proceeding.

Further, the giving of the information in the instant case is in no way incriminatory; it is remaining *silent* which is the essence of the offense. As well put in *People v Weagar*, 251 Cal App 2d 584; 59 Cal Rptr 661, 673 (1967), *cert denied* 389 US 1047 (1968): "The silence here is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation under circumstances which call for one." Although the term "right to silence" is frequently used as a shorthand expression for the Fifth Amendment prohibition against compelling a person to be a witness against himself, the two do not equate. A person may be compelled to supply information so long as he is not compelled to give information which will incriminate him. If it were otherwise, witnesses could not be subpoenaed to testify, and income tax and census forms would go unfilled.

¹² See also *People v Hall*, 396 Mich 650; 242 NW2d 377 (1976) (lineup and speaking requirement); *People v Rankins*, 81 Mich App 694; 265 NW2d 792 (1978) (hair sample); *People v Henderson*, 69 Mich App 418; 245 NW2d 72 (1976) (voice exemplars).

Petitioner agrees with the California Court of Appeals that the ordinance's requirement of identification "does not conflict with the privilege against self-incrimination." *People v Solomon, supra*, 108 Cal Rptr at 872.

C. Vagueness

The Michigan Court of Appeals held that the ordinance is vague for failing to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden in that "An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime." The court also held that the ordinance was vague for seeking "to make criminal conduct which is innocent," and for undercutting the probable cause standard of the Fourth Amendment by "sanctioning full searches on suspicion." Keeping in mind that "The Constitution does not require impossible standards," *United States v Petrillo*, 332 US 1, 7; 67 S Ct 1538; 91 L Ed 1877 (1946) and that "lack of precision is not itself offensive to the requirements of due process," *Roth v United States*, 354 US 476, 491; 77 S Ct 1304; 1 L Ed 2d 1498 (1957), Petitioner submits that the ordinance is constitutional.

The logic of the Michigan Court of Appeals' position that the ordinance is vague because "An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore

cannot know when refusal to identify himself will be a crime" is plainly untenable. Neither can an innocent citizen generally know when a police officer has probable cause for his arrest, and thus cannot know when resisting arrest will be a crime, yet it would not rationally be suggested that the offense of resisting a lawful arrest is unconstitutionally vague. Just as the arrest is governed by probable cause standards, the stop in the instant case is governed by the standards of *Terry v Ohio*. Thus, no claim can be made that the ordinance gives the police "unbridled discretion" to stop persons. See *People v Solomon, supra*, 108 Cal Rptr at 871. The focus of the inquiry should be on the term "identify."

Although petitioner will make brief mention of it, it must be remembered that the instant case is not a "verifiable proof" case, but a failure to identify case. Turning again to the California Court of Appeals, which has dealt with this precise issue, it can be seen that the term "identify" is not vague.

The court in *People v Wegar, supra*, 59 Cal Rptr at 667-668 closely analyzed the term "identify" and found it sufficiently precise.

Here, again, we may look to the commonly accepted meaning of the words. According to the American College Dictionary, 'identify' means to 'establish as being a particular person or thing; attest or prove to be as purported or asserted.' 'Identification,' according to College Law Dictionary means 'Proof that a person or thing is the person or thing (he or) it is supposed or represented to be. . . .' 59 Cal Rptr at 667-668.

Petitioner agrees with *People v Solomon*, *supra* at 871 that the "person requested to identify himself is put on direct notice as to what constitutes the unlawful conduct, for before any violation of the statute can occur the request for identification must first be made." The area possibly open to interpretation is the phrase "verifiable proof, written or oral," and again petitioner would point out that this is not a verifiable proof case. If it were, it would be petitioner's position that "verifiable proof" is any information of identity that could be verified as "proof that a person . . . is the person . . . (he) is supposed or represented to be." *People v Wegar*, *supra*.

Two other points in the opinion require comment. First, the court held that the ordinance attempts to "make criminal conduct which is innocent." This formulation appears to be a way of saying that the ordinance is outside the police power, a proposition rejected by petitioner at IIA *supra*. Petitioner would here note *People v West*, 106 NY 293; 12 NE 610, quoted in Clark and Marshall, Crimes, Sec 1:05, p. 29:

It is not a good objection to a statute prohibiting a particular act, and making its commission a public offense, that the prohibited act was, before the statute, lawful or innocent, and without any element of moral turpitude. It is the province of the legislature to determine, in the interest of the public, what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, and not at all evil in their intrinsic quality . . . the justice and wisdom of penal legislation, and its extent within constitutional limits, is a matter resting in the judgment of the legislative branch of the government, with which courts cannot interfere.

As to the statement by the Michigan Court of Appeals that the ordinance "sanctions full searches on suspicion" petitioner can only point out that the court misperceived the ordinance, for the search is not incident to the stop, but to the custodial arrest for the ordinance violation. *United States v Robinson*, 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973); *Gustafson v Florida*, 414 US 260; 94 S Ct 488; 38 L Ed 2d 456 (1973). If this Court reaches the question, the Michigan Court of Appeals should be reversed and the ordinance upheld.

CONCLUSION

Wherefore, Petitioner concludes that the Court should reverse the Michigan Court of Appeals, hold that the seizure of the phencylidene was accomplished without violation of any constitutional right of respondent, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

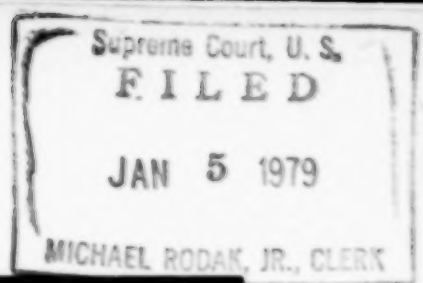
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Dated: November 14, 1978



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-1680

THE STATE OF MICHIGAN,

Petitioner,

v.

GARY DeFILLIPPO,

Respondent.

BRIEF FOR THE RESPONDENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-1680

THE STATE OF MICHIGAN,

Petitioner,

v.

GARY DeFILLIPPO,

Respondent.

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

I.

**WHETHER THE DETROIT STOP AND
IDENTIFY ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE
RIGHT TO DUE PROCESS OF LAW, THE
RIGHT TO BE FREE FROM UNREASON-
ABLE SEARCHES AND SEIZURES, AND
THE PRIVILEGE AGAINST SELF-
INCRIMINATION?**

II.

WHETHER EVIDENCE SEIZED THROUGH AN ARREST AND SEARCH PURSUANT TO AN ORDINANCE SUBSEQUENTLY DECLARED UNCONSTITUTIONAL AS VOID FOR VAGUENESS AND CONTRARY TO THE FOURTH AMENDMENT, IS INADMISSIBLE REGARDLESS OF THE OFFICIAL'S GOOD FAITH?

III.

WHETHER THE ACTIONS OF DETROIT OFFICIALS IN ENACTING AND ENFORCING THE STOP AND IDENTIFY ORDINANCE WERE PURSUED IN COMPLETE GOOD FAITH?

IV.

WHETHER THIS CAUSE MAY BE RESOLVED ON ADEQUATE AND INDEPENDENT STATE GROUNDS?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and

to petition the government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On Sunday evening, August 15, 1976, a rock concert at Detroit's Cobo Hall was disrupted by an "unruly mob of teenagers."¹ Police called to the scene were unable to quell what was described as "something close to a riot"² and by midnight forty-seven persons had been arrested on charges of sexual attacks, robberies and assaults.³ City administration officials demanded a quick response.⁴

The Detroit Common Council, then in summer recess, called an emergency meeting for Wednesday, August 18, 1976. At the suggestion of the Law Department of the City⁵

¹*Detroit News*, Monday, August 16, 1976, Page 1A.

²Deputy Mayor William J. Beckham, Jr., quoted in the *Detroit Free Press*, Tuesday, August 17, 1976, Page 1A.

³*Detroit News*, Monday, August 16, 1976, Page 1A.

⁴Deputy Mayor Beckham quoted vacationing Mayor Coleman Young as saying, "I want the pimps, prostitutes, gangs and youth rovers off the streets. We're going to rid the city of them — beginning tonight." The Detroit Common Council was given until Thursday, August 19, to act or the Mayor would declare a limited state of emergency. *Detroit Free Press*, Tuesday, August 17, 1976, Page 1A.

Robert Pisor, Mayor Young's press secretary stated: "The line has been drawn on gangs. If that line was crossed last night (at Cobo Hall), we want to know why no heads were cracked." *Detroit News*, Monday, August 16, 1976, Page 1A.

⁵A letter from Richard L. Manetta, Assistant Corporation Counsel to the Detroit Common Council, provided in part:

"After several incidents involving the blatant and utter disregard for the law by several gangs of minors, the latest one having occurred last Sunday night, August 15, 1976, at Cobo Hall, the Mayor has decided to take several steps to counteract the reckless actions of these minors. To this end, you will find attached an emergency ordinance...

"With the cooperation of the Legislative Branch, this City will meet its most recent challenge and the streets of the Detroit will be safe once again." *Journal of the City County*, August 18, 1976, p. 1677.

a new curfew was enacted⁶ and Detroit's "Stop and Frisk" ordinance was amended making it illegal for any person stopped pursuant to that section to refuse to identify himself and provide verifiable documents or other evidence of such identification to a police officer.⁷

⁶Chapter 36, Article 3, Section 1 and 2, City of Detroit Municipal Code.

⁷ORDINANCE NO. 143-H, CHAPTER 39, ARTICLE I, AUTHORITY OF POLICE OFFICERS TO STOP AND QUESTION SUSPICIOUS PERSONS, AN ORDINANCE to amend Chapter 39, Article I of the Code of the City of Detroit by amending Section 39-1-52.3 to provide that it shall be unlawful for any person stopped pursuant to this section to refuse to identify himself to the police officer.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

WHEREAS the "Stop and Frisk" ordinance authorizes a police officer to conduct an investigation for criminal activity when the facts warrant such an investigation, and a police officer is further authorized by Section 39-1-52.4 to make a limited protective search of the person suspected of criminal activity, but does not permit the police officer to demand that the suspect provide reliable information as to his identity, and offers the police officer no alternative if the request for identification is refused; and

WHEREAS crime of every description is on the increase within the City of Detroit, particularly street crimes committed by juveniles or "gangs" of young persons who consistently refuse to cooperate with the police in conducting their investigations; and

WHEREAS the Mayor of the City of Detroit has declared an emergency exists and an all out "war" against the juveniles responsible for this increase in crime, and the adults who encourage and cooperate with them;

NOW, THEREFORE, the City Council declares an emergency requiring the immediate enactment of this ordinance to insure the effective investigation by the Detroit Police Department of suspected criminal activity.

Section 1. That Chapter 39, Article 1 of the Code of the City of Detroit be amended by amending Section 39-1-52.3 as follows:

Section 39-1-52.3. When a police officer has reasonable cause to

The cause before this Court tests the constitutionality of that ordinance.

On September 14, 1976, at approximately 10:00 p.m., two Detroit police officers answered a radio run to investigate two people who appeared drunk in an alley (A. 4). The officers found respondent Gary DeFillippo and a young lady and both were asked for identification. The young lady produced numerous pieces of identification (A. 5, 9-10), but was arrested anyway for disorderly conduct because the officer detected a strong odor or alcohol (A. 5).

Respondent, when questioned, allegedly told the officer that he was Sergeant Mash, a Detroit police officer (A. 5), and then, when asked for further identification, the officer claims respondent corrected himself (A. 11) to say either that he knew Sergeant Mash (A. 8, 11) or that he worked

believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity.

Section 2. This emergency ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the people of the City of Detroit and is hereby given immediate effect.

(JCC P. 1680, August 18, 1976)

Passed August 18, 1976.

Approved August 18, 1976.

Published August 19, 1976.

Effective August 19, 1976

JAMES H. BRADLEY,
City Clerk

for Sergeant Mash (A. 5). The officer admits that respondent did not appear to be drunk, (A. 8) but he was arrested for failure to produce identification (A. 5, 8, 10).

Mr. DeFillippo was then patted down, and the officer, through his "sensory perception" (A. 9) felt a bag of marijuana in respondent's right shirt pocket (A. 6, 9). A package of cigarettes was also taken from Mr. DeFillippo's left breast pocket (A. 6, 12), and the officer observed a tinfoil pack inside the cigarette package. The tinfoil package was further searched at the police station and found to contain 0.13 gram of phencyclidine (A. 7).

Respondent, over timely objections (A. 12-14), was bound over for trial on a charge of possession of phencyclidine, a felony with a maximum incarceration of four years MCLA 335.341(4)(b); MSA18.1070(4)(b). Respondent was not charged with or prosecuted for violation of the Stop and Identify Ordinance. A motion to suppress from evidence the tinfoil packet was brought prior to trial and was denied, and an interlocutory appeal was taken to the Michigan Court of Appeals. The Michigan court held that Detroit City Ordinance 39-1-52.3 was unconstitutional and since the ordinance was void, the search incident to the arrest for violation of the ordinance was unlawful. The evidence was ordered suppressed. On May 1, 1978, the Michigan Supreme Court denied petitioner's application for leave to appeal.

SUMMARY OF ARGUMENT

The Detroit City Code 39-1-52.3 allowed a police officer to stop a citizen upon suspicion and, having stopped him, to demand identification. The Michigan Court of Appeals

held this ordinance to be unconstitutional and held that searches conducted pursuant to it were unlawful.

This "Stop and Identify" ordinance contains two elements. First, the activity of a citizen must be suspicious in the mind of an officer and, second, a person who the officer believes suspicious must be unable to produce sufficient identification. The ordinance violates the Due Process Clause of the Fourteenth Amendment. A person cannot know when an officer will reasonably believe that the person's activities are suspicious and, therefore, a person cannot know when he must provide identification. Furthermore, the term "identification" is undefined and as such the average person cannot know what documentation he must carry to satisfy the ordinance.

The Detroit ordinance also violates the Fourth Amendment. Since the identification language of the ordinance does not provide a reasonable standard for arrest, a citizen may be arrested simply for suspicion rather than on probable cause.

If an officer is not satisfied with the information given to him, he may, in the guise of eliciting further information, compel a person to reveal facts which could implicate that person in a crime. This is violative of the Fifth Amendment.

The "good faith" of an officer in enforcing a statute which violates due process, undercuts the Fourth Amendment and violates the Fifth Amendment is immaterial. This Court has held in *Almeida-Sanchez v. United States*, 413 U.S. 266; 93 S. Ct. 2535; 37 L.Ed.2d 596 (1973), that a search incident to an arrest under the authority of an unconstitutional statute is an unlawful search.

Finally, no "good faith" test should apply to the facts of this case. The Detroit Common Council lacked good faith in passing an ordinance they knew to be ambiguous and in an

area preempted by state law. The arresting officer lacked good faith by stopping respondent on less than suspicious circumstances and arresting him in violation of other provisions of the City Code.

ARGUMENT

I.

THE DETROIT STOP AND IDENTIFY ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE RIGHT TO DUE PROCESS OF LAW, THE RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, AND THE PRIVILEGE AGAINST SELF-INCRIMINATION.

On August 18, 1976, the Detroit Common Council amended the City Code to allow a police officer to demand identification from a citizen whenever the officer "has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity."⁸ This amendment was hastily adopted in response to the Mayor's declaration of an "all out war" against an upsurge of lawless juvenile gangs on the streets of the City of Detroit.⁹

The ordinance represents a statutory scheme allowing arrests and convictions of persons whose behavior could not be directly and constitutionally prohibited by vagrancy,

⁸See footnote 7, *supra*, Statement of Facts.

⁹See footnotes 1-5, *supra*, Statement of Facts.

loitering, annoyance or suspicious persons penal ordinances.¹⁰ While some police regulation of public places is a necessity in a complex and densely populated society, the vagueness and ambiguity of this "Stop and Identify" ordinance permits wholly indiscriminate police interference with the common public activity of ordinary citizens.

The ordinance invites unpredictable intrusions upon the citizen's privacy, freedom of movement,¹¹ freedom to

¹⁰*Coates v. Cincinnati*, 402 U.S. 611; 91 S. Ct. 1686; 29 L.Ed.2d 214 (1971) (an annoyance ordinance), *Palmer v. Euclid*, 402 U.S. 544; 91 S. Ct. 1563; 29 L.Ed.2d 98 (1971) (a suspicious person ordinance), *Papachristou v. City of Jacksonville*, 405 U.S. 156; 92 S. Ct. 839; 31 L.Ed.2d 110 (1972) (a vagrancy ordinance), *Shuttlesworth v. Birmingham*, 382 U.S. 87; S. Ct. 211; 15 L.Ed.2d 176 (1965) (a loitering ordinance.)

¹¹The Michigan Court of Appeals held that:

...the ordinance seeks to make criminal, conduct which is innocent. *Papachristou v. City of Jacksonville*, *supra*, *Detroit v. Sanchez*, 18 Mich. App. 399, 401-402; 171 N.W.2d 452, 453 (1969).

Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion — to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. *Pinkerton v. Verberg*, 78 Mich. 573, 584; 44 N.W. 579, 582-583 (1889). *People v. DeFillippo*, 80 Mich. App. 197, 202; 262 N.W.2d 921 (1977).

associate with others and his "right to be let alone — the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478; 48 S. Ct. 564; 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

A. The Ordinance Is Void For Vagueness.

A criminal statute which does not clearly define the conduct which it purports to punish, whose vague, ambiguous and fluid language sweeps unwary citizens under its prohibition without fair notice, violates the Fourteenth Amendment guarantee of due process of law. Where the statute inhibits behavior which is constitutionally protected as a fundamental right, the Due Process Clause requires a high degree of specificity in the statutory language employed.

The state may not impose criminal liability for conduct or speech which an average person could not reasonably understand to be forbidden. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453; 59 S. Ct. 618; 83 L.Ed. 888 (1939). When persons of common intelligence must guess at the meaning of a statute, that enactment violates the first essential of due process of law. *Connally v. General Construction Co.*, 269 U.S. 385, 391; 46 S. Ct. 126; 70 L.Ed. 322 (1926).

By its terms the Stop and Identify ordinance is violated only if the police officer stops the citizen for purposes of a *criminal investigation* and it subsequently appears that the citizen does not have the required "identification." When an officer stops a citizen for any other purpose, lack of

identification will not violate the ordinance even if the citizen refuses or is unable to give his "true identity" to the officer's satisfaction.

In almost all cases, a police officer arrests a person for the commission of a crime; however, the police stop citizens on the streets for numerous reasons other than the investigation of criminal activity. The Michigan Court of Appeals held that "an innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime." *People v. DeFillippo*, 80 Mich. App. 197, 201; 262 N.W.2d 921 (1978). The ordinance imposes no duty or requirement on the police to inform the citizen of the purpose of the intrusion and the requirement of identification. Without being informed by the officer of the purpose of the stop, the citizen of average intelligence, who has read the ordinance, would not have fair notice of the officer's subjective intent. When the citizen's innocent behavior is constitutionally protected, as in *Papachristou v. City of Jacksonville*, 405 U.S. 156; 92 S. Ct. 839, 31 L.Ed.2d 140 (1972), the lack of fair notice of *when* sufficient identification is required renders the ordinance at issue here in violation of due process of law.

The language of the ordinance which allows the officer to significantly intrude on the personal security of citizens is, itself, contradictory. According to the enactment, it shall be unlawful "to *refuse* to identify" oneself. However, in the next sentence, if the person is "*unable* to provide reasonable evidence of his true identity," the officer may transport the person to the nearest precinct. The act of *refusing* to identify oneself is vastly different from being *unable* to identify oneself. The citizen who is unable to

provide "verifiable documents" of identification, but volunteers his name, address and a reference, is hardly refusing to give the officer evidence of his "true identity." The language of the ordinance is therefore confusing to the average citizen.

The ordinance is vague, ambiguous and lacking in ascertainable standards to the extent that the identification requirement fails to give reasonable and fair notice of what constitutes an unlawful act. Compare *Palmer v. Euclid*, 402 U.S. 544; 91 S. Ct. 1563; 29 L.Ed.2d 98 (1971). People of common intelligence must necessarily guess as to what type of documentation they must have with them to walk the public streets. What type of document will satisfy the Stop and Identify ordinance? Does the document have to be issued by a particular agency, the city, state or federal government, to render it reasonable evidence of identification? May the document be issued by a private club, association or corporation? Must the document contain a recent and accurate picture of the person, his signature, his birthdate, address, social security or phone number to be considered "verifiable" under the ordinance? Is more than one document required?

If the ordinance only requires verifiable "oral" evidence of "true identity," what kind and how much information must a citizen volunteer to the officer to prove that his identity has been verified and is true? Does a person stand in a public place, free from arrest, based only on how many character references he may give to an officer to prove his identity? Must a citizen upon request tell a police officer where he lives, what he does for employment, who he knows or why he is on the public sidewalk in order to satisfy the police officer that he is who he says he is?

And what of the plight of the visitor from Onsted,

Michigan or Toledo, Ohio? Will they be able to verify their names or addresses or whatever pieces of identification they may produce? Under any application of the Detroit ordinance tourists, visitors or conventioners would be well advised to remain in the safety of their hometowns rather than to risk the refusal by a Detroit police officer of a driver's license issued by the state of Utah.

This Court held in *Hynes v. Mayor of Oradell*, 425 U.S. 610; 96 S. Ct. 1755; 48 L.Ed.2d 243 (1976) that an ordinance which regulated the First Amendment area of canvassing and soliciting violated the Due Process Clause because of vagueness. The ordinance in that case was a crime prevention provision¹² which required a person or organization, who desired to canvass or solicit from house to house, to first notify the police department in writing for *identification* only. This ordinance was constitutionally infirm because the provision did not "sufficiently specify what those within its reach must do in order to comply" with its identification requirement. 425 U.S. at 621. This Court held that the ordinance "'may trap the innocent by not providing fair warning.'" *Grayned v. City of Rockford*, 408 U.S. 104, 108; 33 L.Ed.2d 222, 92 S. Ct. 2294 (1972)." 425 U.S. at 622.

The ordinance at issue here lacks the same degree of specificity as did the ordinance in *Hynes* because the word "identification" is used without indicating what form of identification satisfies the ordinance.

The absence of enunciated guidelines also permits and encourages harsh and discriminatory enforcement by local authorities against the members of unpopular or controver-

¹²See discussion at 425 U.S. at 617-620. The ordinance in *Hynes*, *supra* at 611 n.1, made it a misdemeanor to violate its provisions.

sial groups. See *Papachristou*, *supra* at 170. If there was suspicion of criminal activity in the vicinity of a pro-Nazi rally in Skokie, Illinois, a lobbying effort by the National Organization for Reform of Marijuana Laws in Washington, D.C., or a gay-rights protest in Miami, Florida, could local enforcement officials demand identification documents from all participants? The terms of the Detroit ordinance would appear to answer this query affirmatively.¹³

This Court constitutionally criticized the loitering ordinance in *Shuttlesworth v. Birmingham*, 382 U.S. 87; 86 S. Ct. 211; 15 L.Ed.2d 176 (1965), because it did "'not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.'" The Stop and Identify ordinance suffers from the same unconstitutional vice.

"The vice of constitutional vagueness is further aggravated where... the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287; 82 S. Ct. 275; 7 L.Ed.2d 285 (1961). The Detroit ordinance allows arrest and conviction of a citizen who refuses to identify himself and who in a nonprovocative manner voices his objection because he feels the detention is highly questionable. The First Amendment right to freedom of speech protects the speech of the protesting arrestee when the words spoken are the

¹³This Court held in *Marcus v. Property Search Warrant*, 367 U.S. 717, 729; 81 S. Ct. 1708; 6 L.Ed.2d 1127 (1961) that:

The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.

basis of the arrest and conviction. *Norwell v. Cincinnati*, 414 U.S. 14; 94 S. Ct. 187; 38 L.Ed.2d 170 (1973). Because the ordinance infringes upon the First Amendment by punishing and inhibiting a citizen's right to unabashedly protest his arrest, it is unconstitutional.

B. The Ordinance Undercuts The Fourth Amendment Requirement Of Searches Only Upon Probable Cause.

The only legislative purpose clearly suggested by the Detroit Common Council was that the ordinance was needed "to insure the effective investigation by the Detroit Police Department of suspected criminal activity."¹⁴ The ordinance contains a purportedly *Terry*-type standard for the stop of a citizen. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 186; 20 L.Ed.2d 889 (1968). Pursuant to authority granted the police officer, he may arrest a citizen who does not have the required identification. Incident to that arrest, the officer may then conduct a full-blown custodial search of the citizen. *Gustafson v. Florida*, 414 U.S. 260; 94 S. Ct. 488; 38 L.Ed.2d 456 (1973), *United States v. Robinson*, 414 U.S. 218; 94 S. Ct. 467; 38 L.Ed.2d 427 (1973).

The Fourth Amendment allows a warrantless arrest only where the officer has probable cause to believe that the arrestee has committed a crime; "Under our system, suspicion is not enough for an officer to lay hands on (arrest) a citizen." *Henry v. United States*, 361 U.S. 98, 104; 80 S. Ct. 168; 4 L.Ed.2d 134 (1959). The proper test for probable cause is:

¹⁴See footnote 7, *supra*.

...whether at the moment the facts and circumstances within their (the officers') knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the...(arrestee)...had committed or was committing an offense. *Brinegar v. United States*, 338 U.S. 160, 175-176, 93 L.Ed. 1879, 1890, 60 S. Ct. 1302 (1949) ... 'To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice...' *Beck v. Ohio*, 379 U.S. 89, 91; 85 S. Ct. 223; 13 L.Ed.2d 142 (1964) (emphasis added).

The ordinance under which the respondent was arrested does not meet the probable cause standard of the Fourth Amendment. The enactment attempts to authorize arrests which, in the absence of that ordinance, could not be effected at all. This Court held in *Sibron v. New York*, 392 U.S. 40, 61, 62; 88 S. Ct. 1889; 20 L.Ed.2d 917 (1968) that a State is:

...free to develop its own law of search and seizure to meet the needs of local law enforcement...in the process it may call the standards it employs by any names it may choose. *It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct...(The) emphasis (is) not so much the language employed as the conduct it authorizes.* (Emphasis added).

The Detroit Common Council labeled it a crime for a citizen not to have requisite identification during an officer's investigation of that person for criminal activity. By making such conduct criminal, the Common Council enacted an ordinance which allows an arrest to be effected on the basis of a factual situation short of the probable cause standard which makes an arrest reasonable under the Fourth Amendment.

In reference to an unconstitutional vagrancy ordinance, the Ninth Circuit held in *Powell v. Stone*, 507 F.2d 93, 96 (CA 9, 1974) rev'd on other grounds, 427 U.S. 465; 96 S. Ct. 3037; 49 L.Ed.2d 1067 (1976), that:

...A legislature could not reduce the standard for arrest from probable cause to suspicion; *and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense.* (Emphasis added).

The Detroit ordinance indirectly reduces the proper standard of probable cause for arrest to a *Terry*-type standard by making the absence of identification during a criminal investigation a substantive offense. If a person is properly stopped pursuant to *Terry v. Ohio*, *supra*, the failure to identify oneself adequately to the police officer is just another factor among the suspicious circumstances being investigated. The citizen's failure to answer the officer's questions during the investigation "furnishes no basis for an arrest." *Terry v. Ohio*, *supra* at 34 (White, J., concurring). This Court has held that:

Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality... A direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster. *Papachristou v. City of Jacksonville*, *supra* at 170.¹⁵

¹⁵In a separate opinion in *Palmer v. Euclid*, 402 U.S. 544; 91 S. Ct. 1563; 29 L.Ed.2d 98 (1971), Mr. Justice Stewart held that while a policeman has a duty to investigate suspicious circumstances, the State does not have the constitutional power to make suspicious circumstances a criminal offense, 402 U.S. at 546.

In *Papachristou*, this Court reversed the conviction of Jimmy Lee Smith who with his companion was arrested on a public street. Based on a complaint by store owners, the police stopped Mr. Smith and his companion because of their suspicious activity. Mr. Smith was arrested because he did not have an identification and the officers did not believe his story.

Suspicious circumstances which may justify a stop and investigation do not support an arrest unless they raise to the level of probable cause within the Fourth Amendment.

The central purpose of the Fourth Amendment is to protect the privacy and personal security of persons against arbitrary intrusion by the police. *United States v. Ortiz*, 422 U.S. 391, 895; 95 S. Ct. 2585; 45 L.Ed.2d 623 (1975), *Camara v. Municipal Court*, 387 U.S. 523, 528; 87 S. Ct. 1727; 18 L.Ed.2d 930 (1967), *Wolfe v. Colorado*, 338 U.S. 25, 27; 69 S. Ct. 1359; 93 L.Ed.2d 1782 (1949). A reasonable arrest must always be based on probable cause to believe a crime is being or is about to be committed. *Beck v. Ohio*, *supra* at 91. When a police officer has no standards governing his discretion as to whether a statute has been violated, the officer is permitted and encouraged to arbitrarily enforce the law and arrest persons. *Papachristou*, *supra* at 170. Pursuant to an unconstitutionally vague ordinance, a policeman cannot gauge justification for a reasonable arrest because in such an instance a prudent person cannot form a reasonable basis on which to believe the ordinance is violated. *Powell v. Stone*, 507 F.2d 93, 96 (CA 9, 1974), *Hall v. United States*, 459 F.2d 831, 837 (CA DC, 1972). The Stop and Identify ordinance fails to provide the police with any ascertainable guidelines by which they may determine if a citizen has violated its prohibition. (See Argument I A). The ordinance violates the Fourth Amendment requirement of probable cause because it does not provide sufficiently clear statutory language for an officer to base an articulable reasonable belief that a crime is being committed.

C. The Ordinance Violates The Fifth Amendment Prohibition Against Compulsory Self-Incrimination.

No citizen may be criminally punished for failure to comply with a statutory disclosure requirement if it confronts him with "substantial hazards of self-incrimination." *Haynes v. United States*, 390 U.S. 85; 88 S. Ct. 722; 19 L.Ed.2d 923 (1968), *Grosso v. United States*, 390 U.S. 62; 88 S. Ct. 709; 19 L.Ed.2d 906 (1968), *Albertson v. S.A.C.B.*, 382 U.S. 70; 86 S. Ct. 194; 15 L.Ed.2d 165 (1965). The Stop and Identify ordinance infringes on the fundamental privilege against self-incrimination because it confronts an arrestee with "substantial hazards of self-incrimination" and not a "mere possibility of incrimination."

A person stopped for investigation is required to "produce verifiable documents or other evidence of such identification." This language gives unbridled discretion to the officer to decide if the person has proved his "true identity." (See Argument I A, *supra*). Under the guise of enforcement more than "mere identity" may be drawn from the unwary citizen; name and address may not be enough for the persistent police officer. Since it is unclear what information must satisfy the ordinance, the unlimited authority given to the police to threaten citizens with arrest is pregnant with abusive power to gain an incriminating statement.

This Court's holding in *California v. Byers*, 402 U.S. 424; 91 S. Ct. 1535, 29 L.Ed.2d 9 (1971), which distinguished the *Albertson* line of cases, is inapplicable to the instant case. The clear purpose of the Detroit ordinance was to give the police department an investigative tool to

ferret out crimes committed by "uncooperative" juvenile gangs.¹⁶ Thus the ordinance was directed at a highly selective group or a group inherently suspect of criminal activities. The ordinance requiring disclosure operates in an area permeated with criminal statutes. It serves as essentially criminal and nonregulatory area of inquiry.

At the same time this ordinance was passed, the Detroit Juvenile Curfew Ordinance was enacted. Detroit City Code 36-3-1 and 36-3-2.¹⁷ The Stop and Identify ordinance was passed to aid the enforcement of the curfew laws. Any "verifiable identification" produced on demand by a citizen will probably contain a statement of age or date of birth. Such identification could establish conclusive proof of a violation of the curfew laws. Therefore, the purpose of the ordinance was to facilitate stops, arrests and convictions of members of juvenile gangs.

¹⁶See footnote 7, *supra*.

¹⁷DETROIT CITY CODE.

Sec. 36-3-1. Public Streets, playgrounds, etc.

It shall be unlawful for a minor to be on the public streets, playgrounds, vacant lots or other unsupervised place, if such minor is under eighteen years of age, between the hours of 10:00 P.M. and 6:00 A.M. except Fridays and Saturdays, when the time for minors sixteen and seventeen years of age shall be between 11:00 P.M. and 6:00 A.M.

DETROIT CITY CODE

Sec. 36-3-2. Theatres, bowling alleys and other places of amusement.

It shall be unlawful for a minor to be in a theatre, moving picture show, bowling room or other place of amusement:

(a) If such minor is under twelve years of age, between the hours of 7:00 P.M. and 6:00 A.M.

(b) If such minor is twelve years of age and under eighteen years of age, between the hours of 9:30 P.M. and 6:00 A.M., except Fridays and Saturdays, when the time for minors sixteen and seventeen years of age shall be between 10:30 P.M. and 6:00 A.M.

It was noted in *Davis v. Mississippi*, 394 U.S. 721; 39 S. Ct. 1394; 22 L.Ed.2d 676 (1969) that it is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have *no right to compel them to answer*." 394 U.S. at 727 fn. 6, (Emphasis added.) See also *People v. Berck*, 32 N.Y.2d 567, 574; 300 N.E.2d 411 (1973), *cert. denied sub nom.*, 414 U.S. 1093; 94 S. Ct. 724; 38 L.Ed.2d 550 (1973).

As Mr. Justice White wrote in his concurring opinion to *Terry v. Ohio*, *supra* at 34, while an officer can stop and question a person on the street:

The person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest. 392 U.S. at 34.

Since the Detroit ordinance attempts to circumvent the Fifth Amendment by requiring answers to questions, which answers may form the basis of a criminal prosecution, the ordinance is unconstitutional.

II.

EVIDENCE SEIZED THROUGH AN ARREST AND SEARCH PURSUANT TO AN ORDINANCE SUBSEQUENTLY DECLARED UNCONSTITUTIONAL AS VOID FOR VAGUENESS AND CONTRARY TO THE FOURTH AMENDMENT, IS INADMISSIBLE REGARDLESS OF THE OFFICIAL'S GOOD FAITH.

A warrantless search is "*per se* unreasonable under the Fourth Amendment — subject only to a few specifically

established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455; 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971). Certainly one such exception is a search and seizure made incident to an arrest. However, when the arrest exception is relied upon "the constitutional validity of the search...must depend upon the constitutional validity of the...arrest." *Beck v. Ohio*, 379 U.S. 89, 91; 85 S. Ct. 223; 13 L.Ed.2d 142 (1964). Therefore, if the arrest in this case offends the Constitution because it is based upon a void statute, the search is equally offensive to the Constitution.

No "good faith exception" has been recognized to cure this infirmity. "*All evidence* obtained by searches and seizures in violation of the Constitution is...inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643, 655; 81 S. Ct. 684; 6 L.Ed.2d 1081 (1961) (emphasis added).

A. Reliance On An Ordinance Which Violates The Fourth Amendment Does Not Make An Otherwise Illegal Search Constitutional.

The State of Michigan concedes that "where the purpose of a statute is to authorize seizures and/or searches and not to define and regulate conduct criminally, and that authorization is in conflict with the Fourth Amendment, then a seizure or search pursuant to the statute is unreasonable and a violation of the Fourth Amendment, despite the fact that the police acted pursuant to its authorization in good faith." (P.B. 13). Although it is arguable that this concession is dispositive of the instant case, the State apparently maintains that the purpose of the Detroit ordinance is not to authorize searches and that case

law recognizes a distinction between those statutes which regulate conduct criminally and those which allow searches. Respondent DeFillippo contends that the State is wrong on both grounds.

Initially, the Stop and Identify ordinance unquestionably authorizes the search and seizure of an individual *as well as* defining a substantive offense. The ordinance defines the reason for which a person may be seized, authorizes "further investigation" and detention, and ultimately allows an arrest for a newly created offense which necessarily includes an incidental search. Moreover, even if Petitioner were correct, the distinction becomes meaningless with the realization that the search of Mr. DeFillippo was based entirely on the alleged violation of the ordinance. What difference is presented when a search is conducted because an ordinance directly authorizes it, and when an arrest is made pursuant to an ordinance and the search is incident thereto? The same result is achieved through *indirect* means. Finally, although the ordinance defines a substantive offense (failure to produce identification), its practical use as a pretext renders it essentially a procedural ordinance. As Chief Judge Bazelon succinctly said, concurring in *Hall v. United States*, 459 F.2d 831 (CA DC, 1972):

...if the statute, though purporting to define a substantive offense, were designed to "authorize police conduct which trenches upon Fourth Amendment rights", *Sibron v. New York*, 390 U.S. 40, 61 (1968), or if in practice it had not other legitimate effect, the statute itself would then violate the Fourth Amendment, and the good faith or reasonable belief of the police would be irrelevant to the constitutionality of arrests or searches made under it. *A good faith arrest for a "sham offense" stands on the same constitutional plane as a "sham arrest" under a valid statute.* 459 F.2d at 842 (emphasis added).

The decision of this Court in *Almeida-Sanchez v. United States*, 413 U.S. 266; 93 S. Ct. 2535; 37 L.Ed.2d 596 (1973), is a direct counterpoint to the State's position. That case struck down a federal statute which allowed warrantless searches without probable cause of vehicles within a reasonable distance of any external boundary of the United States. Noting that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution", 413 U.S. at 272, the Court struck down the statute and affirmed the principle that:

...those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. 413 U.S. at 274-275.

Nowhere in the majority opinion does the Court in *Almeida-Sanchez* suggest that there is a difference between procedural and penal statutes with respect to violations of the Fourth Amendment.¹⁸ *Almeida-Sanchez* is, therefore, not distinguishable on that ground from the case at bar.

Petitioner implies that *Almeida-Sanchez* stands alone as precedent for invalidating a search authorized by a statute later held unconstitutional. This is not so.

In *Coolidge v. New Hampshire*, 403 U.S. 443; 91 S. Ct. 2022; 29 L.Ed.2d 564 (1971), evidence obtained in an automobile search by police pursuant to a warrant issued by the attorney general of the state was suppressed because the

¹⁸In Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* it is even suggested that the Government had argued that penal statutes are subject to Fourth Amendment restrictions while procedural statutes are not. 413 U.S. at 278-279 (Powell, J., concurring).

warrant was not issued by a "neutral and detached magistrate" as required by the Fourth Amendment, even though a state statute authorized the issuance of the warrant.

In *Berger v. New York*, 388 U.S. 41; 87 S. Ct. 1873; 18 L.Ed.2d 1040 (1967), evidence was obtained through electronic eavesdropping under the authority of a New York statute. This Court ruled that the evidence must be excluded because the statute failed to meet Fourth Amendment requirements.

In *United States v. Brignoni-Ponce*, 422 U.S. 873; 95 S. Ct. 2574; 45 L.Ed.2d 607 (1975), the Government relied upon "statutory authority" to support stopping cars in border areas without warrants. This Court again rejected the argument that arrests without probable cause made in reliance on a statute renders them constitutionally permissible.

"No Act of Congress can authorize a violation of the Constitution", *Almeida-Sanchez, supra* at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas. 422 U.S. at 877-878.

The exclusionary rule was then invoked and testimony of and about two alien passengers found in the car was suppressed.

In *Sibron v. New York*, 390 U.S. 40; 88 S. Ct. 1889; 20 L.Ed.2d 917 (1968), although this Court did not decide upon the validity of the statute under which the police had acted, evidence obtained in a search conducted in accordance with a state "Stop and Frisk" statute was suppressed on Fourth Amendment grounds:

The question in this Court upon review of a state-approved search or seizure is not whether the search

(or seizure) was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. 390 U.S. at 60-61.

In *Hall v. United States*, 459 F.2d 831 (CA DC 1971), the court of appeals excluded evidence in a narcotics prosecution seized incident to a good faith arrest under a vagrancy statute held unconstitutional for undercutting the probable cause requirement. The majority opinion reasoned that "neither Congress in fashioning a statute, nor a law enforcement officer in executing a statute, is free to compromise or ignore the Fourth Amendment." 459 F.2d at 835. The court determined that a constitutional violation had occurred and excluded the evidence.

The Second and Ninth Circuit Courts of Appeals have also applied the exclusionary rule to suppress evidence seized incident to good faith arrests under vagrancy statutes later declared unconstitutional. In *Newsome v. Malcolm*, 492 F.2d 1166 (CA 2, 1974), evidence seized pursuant to such an ordinance was suppressed because the arrest was not supported by probable cause.¹⁹ Since the vagrancy ordinance lacked essential probable cause safeguards, a searched incident to such an arrest was also unsupported by probable cause and therefore invalid. Likewise, the Mich-

¹⁹See also *People v. Peterkin*, 48 AD 2d 843; 368 N.Y.S.2d 290 (1975), where defendant was arrested under a New York loitering statute because he was unable to produce identification. A search incident to the arrest produced evidence used in an armed robbery trial against defendant. The supreme court, appellate division, reversed Peterkin's conviction, noting that "suspicion is not probable cause for arrest" and "the warrantless search, which was made as an incident of an arrest under New York's loitering statute, was illegal since that statute plainly undercuts the requirement that arrests are lawful only upon a showing of probable cause." 368 N.Y.S.2d at 292.

igan Court of Appeals recognized that the Detroit ordinance undercuts the probable cause standard of the Fourth Amendment by, in effect, authorizing full searches on suspicion. In *Powell v. Stone*, 507 F.2d 93 (CA 9, 1974), rev'd on other grounds, 428 U.S. 465; 96 S. Ct. 3037; 49 L.Ed.2d 1057 (1976), the defendant was arrested under a vagrancy ordinance which led to the discovery of a murder weapon in a search incident to the arrest. The ordinance was declared unconstitutional as void for vagueness and because it subverted the Fourth Amendment probable cause standard by making suspicious conduct a substantive offense. The court suppressed the murder weapon regardless of the officer's good faith reliance on the ordinance.

Good faith reliance simply makes no difference when the Fourth Amendment is violated. This Court has not recognized an exception to the exclusionary rule where officers rely in good faith upon a decision of a state supreme court. In *Mincey v. Arizona*, ____ U.S. ____, 98 S. Ct. ____; 57 L.Ed.2d 290 (1978), police officers conducted an extensive warrantless search of Mincey's apartment subsequent to a fatal shooting therein. The officers' actions were specifically sanctioned by a "murder scene exception" set forth in a previous decision of the Arizona Supreme Court. This Court struck down the state-created exception to the warrant requirement stating that the guidelines of that exception would:

...confer unbridled discretion upon the individual officer to interpret such terms as "reasonable period." It is precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amendment requires be made by a neutral and objective magistrate, not a police officer. 57 L.Ed.2d at 301-302.

The matter was then remanded to determine whether the evidence was seized under established Fourth Amendment standards independent of the judicially created exception. Thus, this Court has steadfastly maintained that police conduct must conform to the Fourth Amendment regardless of good faith reliance upon statute, ordinance or court decision.

Michigan courts have even recognized that reliance on our state's constitution is misplaced when that constitution is in conflict with the Fourth Amendment of the United States Constitution. In *People v. Pennington*, 383 Mich. 611; 178 N.W.2d 471 (1970), the Michigan Supreme Court invalidated Article I, § 11 of the Michigan Constitution of 1963, which made the exclusionary rule inapplicable with respect to drugs and dangerous weapons unlawfully seized outside the curtilage of a dwelling house. Therefore, without regard to the officer's reliance on the presumably valid state constitution, a gun seized by the officer from defendant's car without a warrant or probable cause was excluded from evidence.

In summary, states cannot disregard or dilute the Fourth Amendment when enacting laws. When police act pursuant to an ordinance that undercuts the probable cause standard of the Fourth Amendment by sanctioning full searches based on mere suspicion and that ordinance does not provide reasonable standards for determining whether the substantive offense has been committed, then the arrest and incidental search is not constitutionally valid merely because the police relied in good faith upon that ordinance. The Detroit ordinance violates the Fourth Amendment and the decision of the Michigan Court of Appeals should be affirmed.

B. Good Faith Cannot Legitimize An Unconstitutional Ordinance.

This Court has consistently supported the rule that "good faith on the part of the arresting officer is not enough" to justify an arrest or search or dictate the admission of the evidence seized. *Henry v. United States*, 361 U.S. 98, 102; 80 S. Ct. 168; 4 L.Ed.2d 134 (1959), *Beck v. Ohio*, 379 U.S. 89, 97; 88 S. Ct. 223; 13 L.Ed.2d 142 (1964), *Hill v. California*, 401 U.S. 797, 804; 91 S. Ct. 1106; 28 L.Ed.2d 484 (1971). The rejection of a good faith doctrine in *Beck* is clear:

If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. 379 U.S. at 97.

Initially, the question of what constitutes a good faith arises. If mere reliance on an ordinance is sufficient, is an officer free to ignore the Constitution merely because a local ordinance says so? To adopt a good faith standard would require each court to subjectively probe the mind of the officer and speculate whether the police had actual or constructive knowledge of the unconstitutionality of the enactment. This would require the exact case-by-case analysis of the exclusionary rule already rejected by this Court.²⁰

Petitioner cites *United States v. Kilgen*, 445 F.2d 287 (CA 5, 1971), for the proposition that the unconstitutionality of a statute does not automatically render an arrest and

search illegal absent a showing that police lacked a good faith belief in the validity of the statute. In *Kilgen*, however, the defendants had consented to the search in question and furthermore the ruling was based on Kilgen's lack of standing to attack the admissibility of the evidence. 445 F.2d at 289. However, to the extent that dicta in that case supports petitioner's view, it must be noted that the reasoning in *Kilgen* relied upon *Pierson v. Ray*, 380 U.S. 547; 87 S. Ct. 1213; 18 L.Ed.2d 288 (1967). *Pierson* concerned a *civil* action for damages under the Civil Rights Act of 1871 against an officer who arrested the plaintiff under an invalid statute. There was no search involved in *Pierson*, but, even more importantly, while a rule immunizing the police from civil liability if they act in good faith would be appropriate in a tort action for the intentional violation of a defendant's rights, it has no place where Fourth Amendment rights are concerned. "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law." *Silverman v. United States*, 365 U.S. 505, 511; 81 S. Ct. 679; 5 L.Ed.2d 734 (1961).

Good faith cannot be a substitute for Fourth Amendment rights. Moreover, there can be no good faith reliance on an ordinance that violates the Fourth Amendment itself. To hold otherwise would condone police action that flagrantly violates the Fourth Amendment simply because the conduct was authorized by a legislative enactment. The ordinance would then become a replacement for the Fourth Amendment. Since this result should not be tolerated, the Michigan Court of Appeals should be affirmed.

²⁰See *United States v. Peltier*, 422 U.S. 531, 560; 95 S. Ct. 2113; 45 L.Ed.2d 374 (1975) (Brennan, J., dissenting).

C. The Exclusionary Rule Requires Suppression Of This Evidence.

The trend, according to Petitioner (P.B. 15), is to suggest that the primary or sole purpose of the exclusionary rule is to deter unlawful police action and that when an arresting officer has no reason to believe that his conduct is unlawful, then the exclusionary rule is inapplicable because it serves no purpose. Respondent agrees that courts should not attempt to require police officers to be "legal technicians", responsible for making *ad hoc* legal judgments on the constitutionality of an ordinance. However, every police officer presumably knows the principles of the Fourth Amendment and is duty bound to uphold them. Therefore, when an ordinance allows searches on suspicion, officers will have reason to believe that their conduct is unlawful, not based on an ability to be a legal technician but rather based on the Constitution they enforce.

Moreover, the deterrent function is not aimed solely at the individual officers involved and does not depend on the knowledge of those officers. The deterrent function serves a much broader purpose:

The exclusionary rule is aimed at affecting the wider audience of all enforcement officials, and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them. *United States v. Peltier*, 422 U.S. 531, 557; 95 S. Ct. 2313; 45 L.Ed.2d 374 (1975) (Brennan, J., dissenting).

The general, rather than the specific deterrent effect was recognized in *Elkins v. United States*, 364 U.S. 206; 80 S. Ct. 1437; 4 L.Ed.2d 1669 (1960):

The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the

constitutional guaranty in the only effectively available way — by removing the incentive to disregard it. 364 U.S. at 217.

This type of vague ordinance has historically been used as a pretext in hopes of discovering evidence of a more serious crime. Like many vagrancy statutes, the Detroit ordinance is sufficiently imprecise to allow a pretext arrest "which is perhaps not surprising in light of the evidence that many vagrancy statutes and ordinances have been enacted for the express purpose of providing the police with power to arrest suspicious persons." Kamisar, LaFare, Israel, *Modern Criminal Procedure*, p. 291 (1974). The significance of this use of the Detroit ordinance is that should this Court refuse to apply the exclusionary rule, the police may continue to use this or similar ordinances as subterfuges and, by not charging the individual with substantive provisions, no constitutional attack against the ordinance can be mounted. The police would then have the continued use of the ordinance to subvert the Fourth Amendment and the ordinance would remain forever unreviewable. It should be noted here that although Gary DeFillippo was originally arrested for violation of The Stop and Identify ordinance, he was never prosecuted for that violation.

If, as this Court has clearly announced, legislatures are not free to pass laws that violate the Constitution, the appropriate remedy of exclusion and its deterrent effect should apply equally to them.

Although the deterrent effect of the exclusionary rule is of prime importance, it does not represent, either historically or factually, the only supporting function to the rule. Application of the exclusionary rule serves another vital function — "the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222; 80 S. Ct. 1437; 4 L.Ed.2d 1669 (1960). The judicial integrity of the courts is protected by ensuring that they "will not be made party to

lawless invasions of the constitutional rights of citizens by permitting unhindered use of the fruits of such invasions." *Terry v. Ohio*, 392 U.S. 1, 12-13; 88 S. Ct. 1868; 20 L.Ed.2d 889 (1968). Contrary to Petitioner's assertion (P.B. 19) the judicial integrity of the courts is not infringed only when there is a willful violation of the Constitution because the focus is on whether the courts will turn a deaf ear to constitutional violations rather than on the conduct of the police. Judicial integrity is preserved when a court does not sanction invasions of citizens' constitutional rights merely because an officer relied on an unconstitutional ordinance.

Finally, the intrusion upon Fourth Amendment rights cannot be considered minimal in comparison with the need for law enforcement practices that the ordinance attempts to promote.

The need of law enforcement stands in constant tension with constitutional protections of the individual against certain exercise of official power. It is precisely the predictability of these pressures that compels a resolute loyalty to constitutional safeguards. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272; 93 S. Ct. 2435; 37 L.Ed.2d 596 (1973).

Underlying policies of deterrence and judicial integrity require that the exclusionary rule be applied. Ultimately, if this Court concludes that the policies supporting the exclusionary rule do not demand the suppression of the evidence, the question becomes why a balancing of the policies through a "pragmatic analysis" should be determinative of paramount individual claims to enforcement of constitutional guaranties. Constitutional rights must be respected even if there is a conflict of supporting policies. The Fourth Amendment cannot be ignored simply because it does not advance certain judicial or societal goals. The Michigan Court of Appeals properly invoked the exclusionary rule and their decision should be affirmed.

III.

THE ACTIONS OF DETROIT OFFICIALS IN ENACTING AND ENFORCING THE "STOP AND IDENTIFY" ORDINANCE WERE NOT PURSUED IN COMPLETE GOOD FAITH.

A. The Detroit Common Council Lacked Good Faith.

If this Court should decide that an exception to the exclusionary rule exists allowing evidence seized pursuant to an unlawful arrest when the official action was pursued in good faith, a detailed examination should follow testing whether the officials in the instant case qualify under the exception. It is clear that mere reliance on the presumptive validity of the ordinance by police officers is insufficient because if it were not so, this Court would sanction legislative enactment of sham offenses and pretext arrests under those ordinances.

Therefore our scrutiny here should begin with the motivations of the Detroit Common Council in promulgating § 39-1-52.²¹ As was previously noted,²² the Council

²¹Respondent agrees with the Ninth Circuit Court of Appeals that "the public interest is served by deterring legislators from enacting such statutes (which allow arrest on less than probable cause)." *Powell v. Stone*, 507 F.2d 93, 98 (CA 9, 1974), *rev'd on other grounds*, 428 U.S. 465; 96 S. Ct. 3037; 49 L.Ed.2d 1067 (1976).

Additionally, it is interesting to note that when petitioner seeks to justify the right of a legislative body to pass such a law, the justification is based on the "police power" of the legislature. Petitioner's Brief P. 22. It is, therefore, straining the rationale of the exclusionary rule to maintain that it applies only to police officers and not to legislators.

²²See footnotes 4 and 5, *supra*.

in a crisis session met on August 18, 1976, hoping to remedy the problem of juvenile gang violence in Detroit. Pursuant to that desire a strict curfew²³ and the Stop and Identify Ordinance were passed and given immediate effect.²⁴

The Detroit legislative body, however, had good cause to believe that the ordinance was doomed by its facial ambiguity. During the August 18th session, two proponents of the ordinance spoke before the Common Council, Police Chief Phillip Tannian and Assistant Corporation Council Maureen Reilly. Chief Tannian told the councilpersons that the ordinance would require written identification including name, address and "anything sufficient to identify the person in question."²⁵ At this same session, Ms. Reilly informed the Council that the identification could be oral.²⁶

²³See footnote 6, *supra*.

²⁴Journal of the City Council, August 18, 1976, P. 1680.

²⁵The actual exchange is as follows:

Levin (Council President) — Asked if the ordinance will require specific identification.

Tannian — Stated that it will require written identification on the part of everyone; including the persons' name, address and anything sufficient to identify the individual in question.

Notes of the Special Session of August 18, 1976.
Unofficial record, Page 1.

²⁶The actual exchange is as follows:

Councilman Levin — Referred to Section 39-1-52.3 and asked if identification of a person can be oral.

Ms. Reilly (Asst. Corp. Counsel) — Said yes, if the officer believes the person.

Levin — Asked if it is accurate to say that as written, the proposed ordinance could or might be satisfied with oral identification.

Ms. Reilly — Said yes.

Levin — Asked that the word "reasonable" be inserted before the words evidence of his true identity, in Section 39-1-52.3 of the proposed ordinance. He later asked if it is a fair statement to say that under the ordinance written identification is not required, nor is it conclusive.

Ms. Reilly — Said yes.

Notes of the Special Session of August 18, 1976. Unofficial record, Page 3.

Under these circumstances alone it is difficult to imagine how the council could have known for certain the meaning of the crucial phrase "refuse to identify himself, and to produce verifiable documents or other evidence of such identification." If the council persons were unsure of the interpretation, how could they expect police officers or the respondent to be more certain of how to conform their conduct to law.

Furthermore, the Council in passing the Stop and Identify ordinance knew or should have known that the ordinance was illegal under Michigan state law.

The power to declare a state of emergency and, based upon that situation, to invoke a curfew or restrict the right to travel or assembly is exclusively vested in the office of the Governor of the State of Michigan. MCLA §10.31-10.33. That statute had been recently tested in the Michigan Supreme Court and the ruling from that court was clear and concise. *Walsh v. City of River Rouge*, 385 Mich. 623, 189 N.W.2d 318 (1971).²⁷ Neither a local mayor nor a local city government can effectuate a state of emergency in response to rioting. Neither may promulgate rules or regulations to bring the emergency under control; neither may establish a curfew nor control assembly on public streets. MCLA §10.31; *Walsh*, *supra* at 639-640.

Citizens cannot successfully claim ignorance of the law as an excuse. How then may the Detroit City Council absolve itself from disregarding state law and the pronouncement of the highest court of the state?

²⁷In *Walsh* the court pointed out that not only was the language of the state statute clear, but on two occasions the state legislature attempted to amend the law to give cities emergency powers — both attempts were vigorously vetoed by Governors George Romney and William Milliken. *Walsh v. City of River Rouge*, 385 Mich. 623, 630-634; 189 N.W.2d 318 (1971).

B. The Arresting Officer Lacked Good Faith.

Without regard to the intentions of the drafters of the Stop and Identify legislation, the actions of the arresting officer demonstrate a lack of the "good faith" necessary to qualify this case within the parameters of the exception to the exclusionary rule suggested by petitioner herein.

The Detroit Stop and Identify ordinance requires that before an officer may demand that a citizen produce identification the police officer must have "reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity." Detroit City Code 39-1-52.3. Yet Mr. DeFillippo at the time Officer Bednark demanded identification had violated no law in the officer's presence nor had he done anything to arouse reasonable suspicion of a criminal violation.

The officer's initial radio run was to investigate two drunks in an alley (A. 4). DeFillippo was in the alley but did not appear to be intoxicated by any criteria indicated by the officer (A. 8). A young lady in the same alley was apparently intoxicated (A. 5) and was in the process of removing her pants to urinate (A. 4-5). If the young lady was engaged in a violation of the law amounting to disorderly conduct, how do her actions reflect upon respondent who was, for all appearances, a mere bystander? It has long been the law in the State of Michigan that:

Mere presence, even with knowledge that an offense is about to be committed, or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval sufficient, nor passive acquiescence or consent. *People v. Burrel*, 253 Mich. 311, 323; 235 N.W. 170 (1931).

Therefore, respondent had committed no act which under the specific terms of the ordinance would have given the officer the right to demand identification. How then was Officer Bednark acting in good faith? Perhaps, it will be argued, the officer might have suspected that the lady's partially disrobed appearance coupled with respondent's presence in the alley suggested the possibility of an attempted forcible sex offense. This argument will also not fit the facts since the lady explained her condition to the officers in a manner to exclude Mr. DeFillippo from culpability (A. 5) and she proceeded to shower affection upon respondent (A. 5).

Further, the Detroit City Code 39-1-52.3 provides in part:

...In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity.

It is significant that the ordinance uses language authorizing limited detention and transportation, rather than a full blown arrest. Officer Bednark, however, made a full arrest and conducted a pat down that even exceeded the *Terry* standard of a "limited search of the outer clothing...in an attempt to discover weapons which might be used to assault him." *Terry v. Ohio*, 392 U.S. 1, 30; 88 S. Ct. 1868; 20 L.Ed.2d 889 (1968).

Officer Bednark found and confiscated a soft plastic bag of marijuana from inside a shirt pocket (A. 9) and a packet of Marlboro cigarettes (in which was found phencyclidine) inside another pocket (A. 12). No where in the transcript of the Preliminary Examination (A. 3-15) is there a single mention of the officer searching DeFillippo for weapons or having the least reason to suspect that he was armed.

Was the patrolman acting in good faith or is it more possible that his actions resemble those of Officer Martin in *Sibron v. New York*, 392 U.S. 40; 88 S. Ct. 1889; 20 L.Ed.2d 917, whose acts were condemned in the following language:

The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of a self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *Sibron v. New York*, 393 U.S. at 64.

Lastly, does the State of Michigan contend that the officer's good faith reliance upon an ordinance should begin and end with this one isolated section of the Detroit City Code? Should not Officer Bednark have placed equal good faith in the section immediately following 39-1-52.3? It states:

When a police officer has stopped a person for questioning pursuant to Section 39-1-52.3 and has reasonable cause to believe there is danger to himself or others, *he may conduct a limited search of that person for dangerous weapons.* Detroit City Code, 39-1-52.4.

Officer Bednark though cognizant of his powers under a Stop and Identify ordinance also ignored two other provisions of the City Code. Section 1-1-9 declares that "each resident of Detroit...enjoys...and it is the public policy of the city to recognize, respect and protect...the right to privacy..."

Detroit City Code 39-1-52.5 requires that:

...in enforcing sections 39-1-52.3 and 39-1-52.4, the Detroit Police Department and the individual police officer will take special care not only to honor the rights of citizens as defined in the United States Constitution but also to safeguard the personal dignity of those affected by it.

Had Officer Bednark applied his good faith reliance equally to the above provisions of the Detroit City Code, the law of the State of Michigan and the Fourth Amendment, it is submitted that respondent DeFillippo would not have been stopped, searched or arrested. Since neither the City Council nor the arresting officer demonstrated "complete good faith"²⁸ in enacting this ordinance or in arresting Gary DeFillippo, the decision of the Michigan Court of Appeals was correct.

IV.

THIS CAUSE MAY BE RSOLVED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

It must here be emphasized that a violation of the state statute by the Council could have provided an adequate independent state ground for decision by the Michigan Court of Appeals. Though the matter was raised in this respondent's brief before the Michigan Court, the issue was not reached for decision. Respondent may however reassert the issue and suggest the propriety of remand to the

²⁸See *Michigan v. Tucker*, 417 U.S. 433, 446; 94 S. Ct. 2357; 42 L.Ed.2d 182 (1974).

Michigan Court of Appeals for further proceedings. Cf. *Smith v. Digmon*, ____ U.S. ____, 98 S. Ct. ____, 54 L.Ed.2d 582 (1978).

It could also be noted that the Michigan Court of Appeals cited to both state and federal authority in reaching its decision in *DeFillippo* and the state authority cited made reference to the term "our constitution" without clarification.²⁹ Under these circumstances remand to the state courts to determine whether the reference was to the United States or Michigan Constitution is an appropriate exercise of judicial restraint as practiced by this Court. *California v. Krivda*, 409 U.S. 33, 93 S. Ct. 32, 34 L.Ed.2d 45 (1972).

²⁹*People v. DeFillippo*, 80 Mich. App. 197; 262 N.W.2d 921 (1977), citing *Pinkerton v. Verberg*, 78 Mich. 573, 584; 44 N.W. 479, 582-583 (1889).

CONCLUSION

Wherefore, Respondent requests that this Court affirm the decision of the Michigan Court of Appeals, hold Detroit City code 39-1-52.3 unconstitutional and rule the search incident to an arrest under that ordinance unlawful. Alternatively, Respondent requests this Court to remand this cause to the Michigan Court of Appeals to determine the existence of adequate independent state grounds for the decision of that court.

Respectfully submitted,

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FEB 5 1979

MICHAEL BODAK JR. CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-1680

THE STATE OF MICHIGAN,
Petitioner,

v.

Gary DeFillippo
Respondent.

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

OPINION BELOW

The Opinion of the Michigan Court of Appeals, Division I, (Petition for Writ of Certiorari, Appendix A, pp 12-15), is reported at 80 Mich App 197; 262 NW2d 921 (1977)).

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on December 6, 1977. The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal was entered May 1, 1978. The Petition for Writ of Certiorari was docketed on May 24, 1977, and granted on October 2, 1978. The jurisdiction of this Court is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

I.

WHETHER AN ARREST MADE IN GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID ORDINANCE IS A VALID ARREST, REGARDLESS OF THE ULTIMATE VALIDITY OF THE ORDINANCE?

II.

IS AN ORDINANCE WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO TERRY V OHIO, 392 US 1; 88 S Ct 1868; 20 LEd 2d 889 (1968) TO REFUSE TO IDENTIFY HIMSELF AND/OR REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY CONSTITUTIONAL?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United State Constitution provides in pertinent part:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Two Detroit Police Officers received a radio call to investigate two allegedly drunken persons in an alley. (R, 3) Upon arrival at the alley the officers found respondent and a female who had her pants down. (R, 3) She was intoxicated; respondent did not appear to be so. When asked for identification respondent replied that he was Sergeant Mash, a Detroit Police Officer. When asked his badge number he then stated that he worked for a Sergeant Mash. (R, 4) He was arrested for failure to produce identification, handcuffed, and searched, the search producing marijuana. (R, 4-5, 9) At the station phencyclidine was found in a pack of defendant's cigarettes. (R, 6-7)

Respondent was charged with possession of phencyclidine. MCLA 335.341(4)(b); MSA 18.1070 (41)(4)-(b). A motion to suppress evidence was denied, and on interlocutory appeal the Michigan Court of Appeals held the ordinance under which respondent was initially arrested unconstitutional (Detroit City Code 39-1-52.3). The court also rejected petitioner's argument that the officer's good faith reliance on the ordinance which had not been declared unconstitutional at the time of the arrest rendered the arrest lawful. On May 1, 1978, the Michigan Supreme Court denied petitioner's application for leave to appeal.

ARGUMENT

I.

AN ARREST MADE IN GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID PENAL ORDINANCE IS A VALID ARREST, REGARDLESS OF THE ULTIMATE VALIDITY OF THE ORDINANCE.

Respondent has alleged that the Detroit Common Council lacked good faith in enacting 39-1-52.3. Petitioner adheres to his argument that the exclusionary rule is not directed towards legislators. Further, respondent's claim that the council should have known that MCLA 10.31 and Walsh v City of River Rouge, 385 Mich 623; 189 NW 2d 318 (1971) prohibited the emergency enactment of 39-1-52.3 is without merit. In People v Arnold Cortez Smith, Mich App ____; ____ NW 2d ____ (No. 77-3096, 1-3-79); dealing with the emergency enactment of another Detroit ordinance, a juvenile curfew ordinance, the court said:

Section 4-116 does not provide for the declaration of a state of emergency with all the attendant consequences as envisioned by MCLA 10.31; MSA 3.4 (1) and Walsh. Rather, it merely provides that an ordinance may be given immediate effect where an emergency situation requires it. . . The provision of the Detroit City Charter which allows such an ordinance to be given immediate effect does not rise to the level of a declaration of a state of emergency as provided for in MCLA 10.31; MSA 3.4(1). We therefore conclude that no preemption problem exists in the instant case.

Respondent has also alleged adequate and independent state grounds for decision, because state grounds were raised but not passed upon by the state court. Of course, this argument leads only to a remand to the Michigan Court of Appeals for further proceedings should Petitioner prevail in this Court. The fact remains that the case was decided below solely on a federal ground. Moreover, the Smith case has decided Respondent's state ground adversely to him.

II.

AN ORDINANCE WHICH PROVIDES THAT IT IS UNLAWFUL FOR ONE VALIDLY STOPPED PURSUANT TO TERRY V OHIO, 392 US 1; 88 S Ct 1868; 20 LEd 2d 889 (1968) TO REFUSE TO IDENTIFY HIMSELF, AND/OR TO REFUSE TO PROVIDE VERIFIABLE PROOF OF HIS IDENTITY, IS NOT UNCONSTITUTIONAL.

Petitioner adheres to his position in his brief heretofore filed.

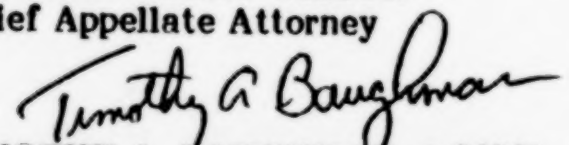
CONCLUSION

WHEREFORE, Petitioner concludes that the Court should reverse the Michigan Court of Appeals, hold that the seizure of the phencyclidene was accomplished without violation of any constitutional right of respondent, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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Dated: January 30, 1979

TAB:pd

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MARSHALL S. BAKER, JR., CLERK

IN THE
Supreme Court of the United States

October Term 1978

No. 77-1680

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

GARY DeFILLIPPO,

Respondent.

**BRIEF OF AMICUS CURIAE
STATE OF CALIFORNIA IN SUPPORT OF
PETITIONER**

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BRIEF OF AMICUS CURIAE
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INTEREST OF AMICUS CURIAE

The Attorney General of California is the chief law officer of the state, whose duty it is to see that the laws of the state of California are uniformly and adequately enforced. (Cal. Const., art. V, § 13.)

Among these statutes is California Penal Code section 647(e), which defines as a misdemeanor the conduct of a person "[w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

The legal and constitutional significance of this California statute is substantially similar to that of the Detroit ordinance under consideration in this case. The people of California thus have a vital interest in this Court's resolution of the constitutionality of Detroit Municipal Code section 39-1-52.3.

SUMMARY OF ARGUMENT

The public interest in suppression and detection of crime has found expression through the centuries in various statutes proscribing vagrancy and loitering. The majority of these statutes, derived from the English common law, focused upon status rather than conduct. Such statutes have in recent years been held unconstitutional, often as being too vague to provide that fair warning essential to the just operation of criminal laws.

The Detroit ordinance, however, like the current California statute, differs in significant respects from the older statutes. The Detroit ordinance authorizes a request for identification only in specifically defined objective circumstances, fully amenable to judicial review. The requirement for identification itself does not involve any form of self-incrimination. Because the Detroit ordinance, like the California statute, is neither overly broad nor vague, focuses upon conduct rather than status, and involves no breach of the privilege against self-incrimination, the decision of the court below was in error and should be set aside, and the constitutionality of the Detroit ordinance affirmed.

ARGUMENT

THE DETROIT ORDINANCE, WHICH FOCUSES UPON CONDUCT RATHER THAN STATUS, IS A CONSTITUTIONAL EXPRESSION OF THE POLICE POWER

The Detroit ordinance, like the California statute, is a modern restatement of a principle of societal organization having ancient roots in the western heritage. For at least eight hundred years, statutes in England and later in America have proscribed vagrancy and loitering. (Sherry, Vagrants, Rogues and Vagabonds--Old Concepts in Need of Revision (1960) 48 Cal.L.Rev. 557, 557-560.)

As one court has recognized,

"Antiloitering statutes have been the source of much legislative and judicial difficulty [citations]. They represent an arena for conflict between healthy antipathy to the 'roust' or arrest on suspicion, on the one hand, and legitimate interests in crime prevention, on the other. Security against arbitrary police intrusion is basic to a free society [citation]. Thus, arrests on mere suspicion offend our constitutional notions. Frequently they amount to arrest for status or condition instead of unlawful conduct. . . .

"At the opposite side of the scale is the view that law enforcement officers need not wring their hands in constitutional frustration while nighttime prowlers and potential thieves and rapists skulk

through our neighborhoods. . . ." (People v. Bruno (1962) 211 Cal. App.2d Supp. 855, 859.)

The fundamental nature of this conflict, and the consequent legislative difficulty in drafting appropriate statutes in response to these clear concerns, should be kept in mind in an analysis of the Detroit ordinance.

A. Analysis

At the time of Mr. DeFillippo's arrest, Detroit Municipal Code section 39-1-52.3 read as follows:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity."

The identity of this ordinance with the California statute is plain. The objective behavior necessary to authorize a request for identification in California is loitering or wandering in circumstances such as to indicate to a reasonable man that the public safety demands identification. This

is simply the logical equivalent of the Detroit ordinance's requirement that the request be preceded by "reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity".

Two factors should be noted with respect to both the California statute and the Detroit ordinance: (1) Each focuses upon conduct, rather than status, as a necessary foundation for a request for identification, and (2) each statute sets forth an objective test, fully amenable to judicial review, by which the legality of an intrusion in any particular case may be determined.

These factors differentiate the Detroit ordinance from older vagrancy statutes. Prior to 1961, for example, in California former Penal Code section 647.6 defined as a misdemeanor a vagrant "[e]very person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business . . .". The unconstitutionality of the former vagrancy statutes was extensively analyzed by Professor Sherry in his article cited above.

In that article Professor Sherry also observed that while the vagrancy law was archaic, quaint, a symbol of injustice, and at variance with prevailing standards of constitutionality, it had survived to meet a particular need. This particular need, which cannot be overstated, is that law enforcement agencies must possess means to ". . . discharge their primary function of preserving law and order and preventing the commission of crime." (48 Cal.L.Rev. at p. 566.)

One proposed revision of the former vagrancy statutes in California completely omitted any language such as that contained in the present California statute and the Detroit ordinance. That bill was vetoed by the Governor of California precisely because it failed to provide any kind of control over those whose conduct afforded police officers legitimate occasion for suspicion. (48 Cal. L.Rev. at p. 571, n. 73.)

What emerged from this process in California was the current statute, which (like the Detroit ordinance) differs markedly from the older vagrancy laws.

B. The Ordinance Is Not
Void For Vagueness

Vague statutes violate due process of law because they offend several important values. First, they fail to give fair notice to a person that his contemplated conduct is forbidden by the statute. (Parker v. Levy (1974) 417 U.S. 733, 752; Smith v. Goguen (1974) 415 U.S. 566, 572; Lanzetta v. New Jersey (1939) 306 U.S. 451, 453.) "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." (United States v. Harriss (1954) 347 U.S. 612, 617; Palmer v. City of Euclid (1971) 402 U.S. 544, 546.) Second, impermissibly vague statutes may result in arbitrary and discriminatory enforcement by law enforcement officials and triers of fact. (Smith v. Goguen, *supra*, at pp. 572-573; Grayned v. City of Rockford (1972) 408 U.S. 104, 108-109; Papachristou v. City of Jacksonville (1972) 405 U.S. 156, 162; United States v. Reese (1876) 92 U.S. 214; Comment, Recent Supreme Court Developments of the Vagueness Doctrine (1974) 7 Conn.L. Rev. 94, 100-105.) Third, such a statute

may "abut upon sensitive areas of basic First Amendment freedoms," operating "to inhibit the exercise of [those] freedoms" (Baggett v. Bullitt (1964) 377 U.S. 360, 372; see Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court (1960) 109 U.Pa.L.Rev. 67, 75; Comment, 7 Conn.L.Rev., *supra*, at pp. 105-115.)

Nevertheless, "lack of precision is not itself offensive to the requirements of due process." (Roth v. United States (1957) 354 U.S. 476, 491. "[T]he Constitution does not require impossible standards." (United States v. Petrillo (1947) 332 U.S. 1, 7.) "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ." (*Id.* at p. 7; Miller v. California (1973) 413 U.S. 15, 27, n. 10.) "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (Nash v. United States (1913) 229 U.S. 373, 377.) A jury may be asked to determine whether conduct is "reasonable." (See United States v. Ragen (1942) 314 U.S. 513, 523.) Although this Court requires a precise statute proscribing specific conduct where First Amendment interests are affected (see Grayned v. City of Rockford, *supra*, 408 U.S. at 109, n. 5; Smith v. California (1959) 361 U.S. 147, 151), this "Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression." (Winters v. New York (1948) 333 U.S. 507, 517.)

The ordinance herein is asserted to be unconstitutionally vague. Yet under Terry v. Ohio (1968) 392 U.S. 1, a peace officer is entitled to detain, frisk, and interrogate a person whose conduct raises a reasonable suspicion of criminal activity. Under Terry a policeman may act when his information warrants the belief by a man of reasonable caution that official intrusion is appropriate. (392 U.S. at pp. 20-21.) As precisely as possible, this standard is set forth in Detroit Municipal Code section 39-1-52.3, as authorizing the request for identification.

Thus the circumstances which trigger the officer's inquiry are to be measured, as is probable cause to arrest, by weighing the factors known to the officer at the time. An arrest may thereafter only be made for refusal to provide identification. Both factors focus on the conduct, rather than the status, of persons such as Mr. DeFillippo. Because this conduct is weighed against an objective standard, the ordinance is clearly sufficiently definite, and provides fair warning.

Nothing in Papachristou, supra, is to the contrary. That case involved the ancient traditional vagrancy ordinance predicated criminality on status alone, with the preamble to the statute in that case defining vagrants to include "[r]ogues and vagabonds, or dissolute persons who go about begging . . .". (405 U.S. at p. 156, n. 1.) As noted above, the Detroit ordinance focuses upon conduct, not status.

Similarly, this Court's decision in Palmer v. City of Euclid, supra, does not control the present matter. The ordinance in Palmer, supra, made it criminal to wander the streets late at night and not

give a satisfactory account of oneself. There were no objective standards by which the statute might be applied, and thus no reasonable notice of what might be unlawful was provided by the ordinance. (402 U.S. at p. 546.) By contrast, as noted above, Detroit Municipal Code section 39-1-52.3 only becomes operative with reference to a specifically articulable objective set of facts.

Because the Detroit ordinance is only violated by one who behaves in such a manner as to provide reasonable cause for a detention, and thereafter refuses to identify himself, the statute is neither void for vagueness nor overbroad. It gives adequate notice of prohibited activities. As this Court noted in another case, "[w]e agree with the [lower] court when it said: 'We believe that citizens who desire to obey the statute will have no difficulty in understanding it'" (Colten v. Kentucky (1972) 407 U.S. 104, 110. See also the excellent analysis of this point in People v. Solomon (1973) 33 Cal.App.3d 429, 432-435; cert. den. 415 U.S. (1974).

C. A Requirement to Identify In Specifically Defined Circumstances Is Constitutional

The court below held the Detroit ordinance unconstitutional because of its supposed vagueness, and also because that court believed "[w]hile police may under certain circumstances intrude upon a person's privacy by stopping him and asking questions, [citation] there can be no requirement that the person answer." (262 N.W.2d 921, 924.)

Although not articulated, it appears the point of the holding was that such a requirement would violate the Fifth Amendment. To the contrary, there is no constitutional impediment to requiring identification in specifically defined circumstances such as those arising under the Detroit ordinance.

The court below relied upon statements in Davis v. Mississippi (1969) 394 U.S. 721, 727, n. 6, and Terry v. Ohio, supra, 392 U.S. at p. 34. In those cases, however, this Court was dealing with questioning going beyond the requirement for identification. It is of course clear that answers may not be compelled in a process of custodial interrogation. In a case involving precisely the same objection to California Penal Code section 647(e) as the court below found to the Detroit ordinance, the California courts have accurately observed that "[t]o the extent that the questions pertain to identification we disagree [that there is a constitutional right to refuse to answer]." (People v. Solomon, supra, 33 Cal.App.3d at p. 436.) As that court went on to observe:

"It is within the bounds of legislative power to proscribe conduct that interferes with prevention and detection of crime, where the proscription is consistent with constitutional rights. [Citations.] We find that the legislative power employed here to compel identification is consistent with constitutional right." (Ibid.)

The distinction between a disclosure of identity and disclosure of other information, not made by the court below, is well settled in the cases of this Court. In a recent case this Court has addressed the problem of "balancing the public need on the one hand, and the individual claim to constitutional protections on the other" with respect to an identification requirement. (California v. Byers (1971) 402 U.S. 424, 427-428.) That opinion went on to state that:

"Even if we were to view the statutory reporting requirement as incriminating in the traditional sense, in our view it would be the 'extravagant' extension of the privilege Justice Holmes warned against to hold that it is testimonial in the Fifth Amendment sense. . . . Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles." (402 U.S. at pp. 431-432.)

As the California courts have recognized, in situations such as the present one

". . . the public need involved, protection of society against crime, is strong; while the individual right involved, anonymity when loitering on the streets under suspicious circumstances, is weak. We view the balance between identification

and anonymity in the case of a loiterer on the streets under circumstances reasonably thought to involve the public safety as falling on the side of identification." (People v. Solomon, *supra*, 33 Cal.App. 3d at pp. 436-437.)

All of these matters were put in proper perspective in another case involving California Penal Code section 647(e). In People v. Weger (1967) 251 Cal.App.2d 584, Justice Fleming makes some observations concerning the duty to identify.

"This duty to identify and account I find substantially similar to the duty of a motorist on the highway to identify himself and establish his right to be on the highway, to demonstrate his condition to exercise that right safely, and to report accidents involving property damage, personal injury, or death. [Citations.] It is comparable to the duty to identify and account which we fulfill at the demand of the building superintendent when we enter our offices late at night, which we satisfy at the demand of customs and immigration inspectors when we return from overseas, which we carry out at the demand of the Director of Internal Revenue when we file our income tax returns. These inquisitions, oral and written, sometimes inconvenient, sometimes vexing, are part of the price we pay to insure domestic tranquility and promote the general welfare.

"The theory that one owes no duties to one's neighbors and is under no obligation to render even small assistance to the public order by identifying and accounting for oneself and thus releasing a peace officer for other work, derives from the exaggerated and extreme individualism of another era, an individualism reflected in the statement of a Vanderbilt, 'The public be damned,' and similarly reflected in the structures of a Proudhon against all government. The theory is essentially anarchistic and hostile to all law, and it implies that the relationship of the citizen to public authority is comparable to that of the inhabitants of a conquered province to an army of occupation, who recognize no legal obligations owed to their temporary masters and whose relationship with them is based entirely on force. But in a society based on law the pure theory of individualism must defer to a reasonable accommodation between private privilege and public interest. When the public safety reasonably demands identification at 2:30 in the morning, the citizen has no constitutional right to remain anonymous." (251 Cal.App.2d at pp. 604-605, footnote omitted.)

In sum, it is abundantly clear a requirement to identify does not involve compelled self-incrimination. It is also clear that the state may impose this requirement in varying circumstances, and has.

No constitutional impediment appears to utilization of that same power to require identification in specifically defined circumstances such that it reasonably appears there is a basis for further investigation of criminal activity and the public safety therefore requires such identification. Because the court below erred in its constitutional analysis of this question, the Detroit ordinance is not in violation of any provision of the United States Constitution.

D. Other Jurisdictions

The court below relied upon People v. Berck (1973) 32 N.Y.2d 567, and United States ex rel. Newsome v. Malcolm (2d Cir. 1974) 492 F.2d 1166. The former case, by a 4-3 vote, held that a New York statute, similar to the Detroit ordinance and the California statute, was unconstitutional. The latter case simply agreed with the state court.

The Berck court interpreted the New York statute as permitting an arrest merely for loitering in suspicious circumstances. (32 N.Y.2d at pp. 569-570.) That court felt the statute was unconstitutionally vague, and compared it to a presumably adequate Model Penal Code provision. (32 N.Y. 2d at p. 573, n. 5.) The Malcolm decision followed this reasoning.

These cases are not in point, however, because the offense, as defined by the Detroit ordinance and the California statute, is refusal to identify oneself in circumstances which provide the "founded suspicion" which justifies an investigative stop and inquiry. (See Wade v. United States (9th Cir. 1972) 457 F.2d 335, 336, for an excellent example of a situation in which

detention and inquiry is justified although probable cause for arrest does not exist.) In other words, the existence of probable cause for investigation when coupled with a refusal to identify constitutes the offense. Authority from jurisdictions construing other statutes in an entirely different manner is not in point, and should not be considered.

CONCLUSION

The problem sought to be addressed by the Detroit ordinance is clear. For example, the presence of a person lingering late at night in the back alleys of a business district which has suffered a high burglary rate clearly warrants investigation by police officers. Consistent with the need to preserve public order and prevent crime, the city of Detroit may constitutionally require such persons to identify themselves. To forbid such reasonable police activity would itself be an unreasonable intrusion into the constitutional power of a legislative body to define offenses in the interest of public safety, and would be an abrogation of this Court's duty to uphold statutes, particularly those dealing with offenses difficult to define, so long as no first amendment values are implicated. (Winters v. New York, supra, 333 U.S. at p. 517.)

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For all of the reasons set forth above, Detroit Municipal Code section 39-1-52.3 is clearly constitutional, and it is respectfully urged that this Court reverse the judgment below and affirm the constitutionality of this narrowly drawn and necessary ordinance.

Respectfully submitted,

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MICHAEL R. DAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978.

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Petitioner,

vs.

GARY DeFILLIPPO,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN.

**BRIEF, AMICI CURIAE, OF AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC., THE INTER-
NATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.,
AND THE MICHIGAN ASSOCIATION OF CHIEFS OF
POLICE.**

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POLICE.**

This brief is filed pursuant to Rule 42 of the Supreme Court of the United States. Consent to file has been received in writing from Counsel for the Petitioners and Counsel for the Respondents. Copies of these letters have been lodged with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

The Michigan Association of Chiefs of Police (MACP) represents over 300 chiefs and top executives of police departments and other law enforcement agencies in the State of Michigan. The MACP serves the law enforcement profession and the public interest by advancing the art of police service

in the State of Michigan. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the State of Michigan, and to encourage adherence of all police officers to high professional standards of performance and conduct.

Our interest in this case arises from the nature of the issue involved—whether an ordinance which provides that it is unlawful for a person to refuse or be unable to produce verifiable proof of identity during a *Terry*-type stop is unconstitutional. This issue raises important legal and practical problems for police officers nationwide. *Amici* believe that field interrogation, including identification checks, should be upheld as a legitimate police practice.

ARGUMENT.

I. Introduction.

The instant case squarely presents the question whether an individual who has been legitimately stopped for field interrogation may be constitutionally detained for failure to identify himself.¹ This is a case of first impression before this Court. The Court has upheld the police practice of stopping and interrogating, on less than probable cause to arrest, persons in public places who are reasonably suspected by law enforcement officers of engaging in criminal or potentially criminal behavior. *Terry v. Ohio*, 392 U.S. 1 (1968); *Adams v. Williams*, 407 U.S. 143

1. The ordinance of the City of Detroit, Detroit City Code No. 39-1-52.3 provides:

When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity.

(1972). The same line of cases permits the officer to make a protective pat-down or "frisk" for weapons of the individual stopped. *Terry v. Ohio*, *supra*; *Adams v. Williams*, *supra*.

This Court, speaking through the late Chief Justice Warren, in *Terry v. Ohio*, *supra*, accurately characterized the practice of stopping and frisking suspect persons as "field interrogation."² However, in *Terry v. Ohio* and in *Adams v. Williams*, the legally justified "stop" and the protective "frisk" produced unlawfully concealed weapons which, in and of themselves, escalated the incident into a situation which produced probable cause for a lawful arrest. Police action was justified by the "frisk" itself.

This case presents a different factual setting. As commentators have noted:

The issue of 'stop and interrogate' has never been fully resolved. The Supreme Court declined to decide whether it was proper to detain a suspect for interrogation on less than probable cause.³

This question has very far-reaching implications, insofar as the effective enforcement of the criminal law is concerned.⁴

2. 392 U.S., at 12 and 14. In each instance, the Court referred to the generic practice of "stop and frisk" as field interrogation.

3. Fred E. Inbau, James R. Thompson, James B. Haddad, James B. Zagel, and Gary L. Starkman, *Criminal Procedure* (New York City: Foundation Press, 1974), p. 240.

4. The People of the State of Michigan argue that Detroit City Code No. 39-1-52.3 is not unconstitutional on its face and, in the alternative, that a law enforcement officer's good faith reliance on an ordinance which has not been held unconstitutional prior to the time of the given arrest should not vitiate a conviction even if the ordinance is subsequently held unconstitutional. We will not reiterate the legal arguments in support of this position, although we agree with them and wish to associate ourselves with them. We address ourselves to the fundamental issue whether, under the ordinance, identification can be constitutionally required.

II. The Ordinance in Question Does Not Give Law Enforcement Officers Carte Blanche Power to Detain a Subject Who Fails to Identify Himself.

As noted, this case involves the constitutional legitimacy of a city ordinance which authorizes the arrest or detention of an individual who refuses to identify himself. However, it is extremely important to note that, under the ordinance in question, an absolute precondition to any such detention is that the officer must have "reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity."⁵

Thus, at the outset, the ordinance is carefully circumscribed. Far from being a blanket authorization to detain anyone whom the officer might encounter for failure to identify, it requires that the *Terry*-type standard of reasonable cause to believe that criminal activity is afoot be met *before* the identification issue even comes into force.

We anticipate that it will be urged on this Court by counsel for Respondent De Fillippo that a general authority on the part of the police to stop all citizens and demand identification, on pain of arrest, will lead to "police state" tactics. This proposition is certainly arguable, but we emphasize again that this simply is not involved in the instant case. If the "reasonable cause" standard, requiring an officer to believe that the subject is engaged in criminal activity, is not met, then the stop would be invalid *ab initio*, and any evidence seized incident to an arrest for "failure to identify" would, of necessity, be suppressed. *Sibron v. New York*, 392 U.S. 40 (1968); *Peters v. New York*, 392 U.S. 40 (1968).

The issue, then, is narrowed considerably. It can be summed up succinctly: this Court has put its constitutional imprimatur on the right of the police to stop and question, on less than probable cause, persons suspected of criminal activity. *Terry v.*

5. *Supra* note 1.

Ohio, supra; Adams v. Williams, supra. The question before the Court now is: after the *Terry*-standard is met (and *only* after the *Terry*-standard is met), how far can the police go in identifying the person or persons whom they have stopped?

III. Field Interrogation Is a Legitimate Police Procedure.

This Court has, in the past, quite properly guarded against arbitrary invasions by the state of individual liberties. *Marshall v. Barlow's, Inc.*, ____ U.S. ____, 98 S.Ct. 1816 (1978). But it has also held that the rights of the citizen are not absolute; the legitimate interest of government to maintain order has also consistently been recognized. *Terry v. Ohio, supra.* A balance of competing interests has always been sought.

This case involves the question whether an individual in a public place, whom a policeman reasonably suspects of criminal behavior, has an absolute right not to identify himself.⁶ If such an absolute right were to be upheld, it would go a long way towards frustrating the legitimate police practice of field interrogation which was recognized in *Terry v. Ohio, supra*, and reemphasized in *Adams v. Williams, supra*, where the Court stated:

A brief stop of a suspicious individual, *in order to determine his identity* or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. 402 U.S., at 146. (Emphasis supplied.)

If the right of an individual *not* to identify himself were to be made absolute, police officers would be put into the anomalous situation whereby they could *ask* for identity, in order to prevent and detect potential criminal activity, but they could

6. This case does *not* involve the question of whether the policeman can compel possibly incriminating statements. If such were the question, important Fifth Amendment issues might be raised. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Detroit ordinance in question confers no authority upon the officer other than to require personal identification.

not require an *answer* to this legitimate question. We suggest that the balancing of interests called for in this case should be resolved in favor of the state.

This Court was confronted with a somewhat analogous situation in *United States v. O'Brien*, 391 U.S. 367 (1968).⁷ That case involved First Amendment freedom of speech rights, as opposed to the Fourth Amendment rights involved in the instant case; the analogy with *O'Brien* arises from the fact that in that case the issue was whether Congress could constitutionally compel the possession of a certain piece of identity, a selective service certificate, and could constitutionally prohibit the destruction or mutilation of the same document.

This Court did not reach the possession issue, because it held that the Congressional prohibition of destruction or mutilation was constitutionally permissible. Of importance to our argument in this brief is the analysis that the Court used in resolving the conflicting interests represented. With regard to the balancing test involved, the Court stated:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers a substantial or important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment rights is no greater than is essential to the furtherance of that interest. 391 U. S., at 377.

We reemphasize our acknowledgement that the instant case is not a First Amendment case; but we also submit that the analysis used by the Court in *O'Brien* should have applicability to Fourth Amendment cases as well. To paraphrase from *O'Brien*, the ordinance should be upheld: if the Detroit ordi-

7. The U. S. Court of Appeals for the First Circuit had held the prohibition on destruction to be unconstitutional as an abridgment of freedom of speech, but upheld *O'Brien's* conviction on the non-possession charge. *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967). This Court reversed on the destruction charge and did not reach the non-possession issue.

nance is within the constitutional powers of that municipality; if the ordinance furthers an important or substantial governmental interest; if the governmental interest is unrelated to suppression of *Fourth* Amendment rights; and if the incidental restrictions on *Fourth* Amendment rights are no greater than are essential to the related governmental interest.

It follows from this analysis that it must be shown that "field interrogation" furthers an important governmental interest and that the restriction on *Fourth* Amendment rights is no greater than that which is essential to further the important governmental right. This is the point which we will address herein.

This Court has recognized that the interest of the government in preventing, detecting and suppressing street crime is an important governmental interest. *Terry v. Ohio, supra*; *Adams v. Williams, supra*. The question remains: is the process of field interrogation essential to the furtherance of that interest when balanced against the incidental restriction of *Fourth* Amendment rights which are inherent in the Detroit ordinance?

Unfortunately, very little work of an empirical nature has been done concerning the effectiveness and necessity of "field interrogation" in the suppression of crime. However, we are able to cite to this Court one such study which supports our position, at least to a certain extent. This study is *San Diego Field Interrogation, Final Report*, by John E. Boydston, published by the Police Foundation in August of 1975 (hereinafter cited as *San Diego Field Interrogation*). It is a study of the effectiveness of Field Interrogation (hereinafter, FI) by the San Diego, California Police Department.

During the period in which the study was conducted, a law was in effect in California which provided for compelled identification during a *Terry*-type stop.⁸ The officers who were studied

8. Section 647(e) of the California Penal Code, provides: Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor: * * * (e) Who loiters or wanders upon the streets or from place to place without apparent

(Footnote continued on next page)

in the report asked for and received the names of the persons whom they stopped.⁹ Consequently, the findings in that Report are very relevant to the issues involved with the ordinance under fire in the instant case.

The Report is quite lengthy, well over 100 pages. For purposes of brevity we will only summarize the findings in the body of this brief. We have reprinted the Executive Summary of findings and conclusions contained in the Report as Appendix "A" to this brief, and we have lodged copies of the full Report with the Office of the Clerk.

The methodology of the study was to compare the effectiveness of Field Interrogation, in San Diego for nine months, on three levels:

- In the Control Area, Field Interrogations were conducted with no change from normally practiced activities.
- In the Special FI Area, normal Field Interrogations were conducted only by officers who were given special supplemental FI training by Approach Associates of Oakland, California. This training focused on methods for reducing any potential friction between FI subjects and patrol officers.
- In the No-FI Area, Field Interrogations were suspended for the nine-month Experimental period.

The conclusions were as follows:

Suppressible Crimes

The analysis supports the hypothesis that some level of FI activity, as opposed to none, provides a deterrent effect

(Footnote continued from preceding page.)

reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification. (Emphasis supplied.)

9. In fact, the observers used the Field Interrogation reports to contact 42 subjects for their views of the propriety of the field interrogations. *San Diego Field Interrogation, supra*, at 25. On the official Field Interrogation Report, a space was left for the subject's name. *San Diego Field Interrogation, supra*. Appendix C, C-3. The author discussed the importance of obtaining identification, quoted in this brief, *infra* at 12.

on suppressible crimes in localized areas. Further study is recommended to investigate probable area-displacement effects and to identify the factors involved in determining the optimum levels of FI activities.

The analysis was inconclusive in identifying the specific types of suppressible crime most influenced by FI activities. However, there were indications that burglary, petty theft, and malicious mischief/disturbances—crimes frequently committed by two or more juveniles or young adults—may be the types most influenced.

Taking into account that most (approximately 83 percent) of the arrests in the department arise from other than FI activities (such as radio calls), and that more than 98 percent of Field Interrogations reported do not result in arrests, it is clear that whatever effects Field Interrogations have on suppressing crime stem mainly from the FI Process itself.

Arrests

Although the analysis failed to show that the frequency of arrests was significantly influenced by the frequency of Field Interrogations, there were indications that FI activities contributed to 15 percent or more of the total arrests made by patrol officers and that reports of Field Interrogations helped to lead to additional arrests as the result of crime investigation activities.

Investigators' Use of Field Interrogation Reports

The current manual filing and retrieval system employed by the San Diego Police Department effectively prohibits any extensive use of FI reports by investigators. Under these conditions, it appears that the actual utility of FI reports to investigators is minimal, although the potential utility is considered to be high by the investigators themselves. Recently, investigators were provided an improved method (a computer-based system for comparing FI report data with the suspect information contained in crime reports). The use of this computer-based system is being analyzed.

Police-Community Relations

The analysis showed that neither the frequency of Field Interrogations nor the type of FI training (regular or supplemental) given to patrol officers had a major influence on the attitudes and opinions of San Diego citizens about police activities, including the stopping and questioning of suspicious persons. There were some indications, however, that negative public reactions might develop if the currently low level of FI activities was greatly increased.

Since the subjects of Field Interrogations conducted by the Special FI officers tended to report the most favorable reactions to FI encounters, the San Diego Police Department should consider incorporating elements of the supplemental FI training into its regular training program. *San Diego Field Interrogation, supra*, at 5-6.

These conclusions were subject to certain qualifications, which is why, as noted above, we have attached the Executive Summary of the Report as an Appendix to this brief and have lodged copies of the full Report with the Clerk of the Court. Nevertheless, we submit that the basic findings and conclusions of the Report indicate that the police practice of Field Interrogation does, in fact, have a significant impact on reducing crime.

It is also significant that Field Interrogations as practiced and studied in San Diego was not a major influence in exacerbating police-community relations.

We do not argue that this single study is conclusive on the issue. In fact, no measure of such a volatile activity as police work on the street can ever be completely conclusive. Our argument is that: (1) This Court has recognized the general necessity of field interrogation, as a legitimate crime-suppressing device, in *Terry v. Ohio, supra*, and *Adams v. Williams, supra*; and (2) The results of the San Diego study appear to bear this out on an empirical basis.

If this is true, then there is a legitimate governmental interest in attempting to suppress a certain amount of crime through

the process of field interrogation, and the practice is certainly constitutional, if properly conducted. *Terry v. Ohio, supra*, and *Adams v. William, supra*. The requirement of identity, as the San Diego study indicates, is an integral part of field interrogation. In fact the Report describes the police rationale of Field Interrogation as follows:

An FI program permits the *immediate identification* of those individuals who arouse the suspicions of patrol officers. Sometimes *the identification process* will result in the apprehension of known offenders, and more frequently it will provide the basis for an immediate reasonable-cause arrest. More important, however, the FI contact will emphasize to potential offenders that the police are aware of their specific identity, presence, and activity in the community. Finally, an effective FI program should help to reassure the general public that the patrol officers are actively engaged in protecting law-abiding citizens and their property, and are not simply waiting for a crime to occur. *San Diego Field Interrogation, supra*, at 7. (Emphasis supplied.)

We submit that the demonstrated effectiveness and necessity for field interrogation *and* identification should weigh the balance in favor of the state's legitimate interest in this area, as opposed to the minimal abridgement of Fourth Amendment rights involved in this particular area. We believe that this Court should uphold the Detroit ordinance which requires a person reasonably suspected of criminal activity to identify himself, and rule generally that compelled personal identification is a legitimate and constitutional concomitant of field interrogation.

Certainly, the facts of the instant case support this view. Respondent De Fillippo was observed by the police in a situation which clearly indicated some sort of criminal activity: a man in a public alley with a woman with her pants down. An officer who responded to this disorderly conduct call was surely not required to "simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972).

The instant case presents even more, however, on the issue of identification. When the responding officers asked De Fillippo who he was, De Fillippo identified himself as a named police officer, Sergeant Match. This court has held that when a given suspect has been identified as a police officer, the officers who have custody of the police officer/suspect can reasonably believe that he has a firearm on or about his person or in his automobile. *Cady v. Dombrowski*, 413 U.S. 433 (1973). Thus, Respondent De Fillippo, by identifying himself as a police sergeant, gave the responding officers extra cause to search him for weapons.

Next, Respondent changed his self-identification and declared that he only *worked* for Sergeant Match, a rather inconclusive statement which could only alert further the officers' suspicions as to the identity of the individual. We can conceive of few clearer cases in which the police officers had not only the right, but the affirmative *duty*, to ascertain just who De Fillippo was, in fact. Thus, the factual situation in the instant case presents a perfect background to demonstrate that the need for identification as an integral part of field interrogation.

CONCLUSION.

The state has a legitimate interest in ascertaining the identity of persons who have been stopped because they are suspected of engaging in possible criminal activity. The intrusion on Fourth Amendment rights is minimal when compared with the necessity for this law enforcement practice. For the foregoing reasons, we urge this Court to reverse the judgment of the Court of Appeals of the State of Michigan.

Respectfully submitted,

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APPENDIX

EXECUTIVE SUMMARY

BACKGROUND

In the course of a normal duty shift, police patrol officers come into contact with a large number of citizens whom they serve. Frequently the contacts are initiated by citizens who, as victims or witnesses of crimes, call for police services. Other, less frequent contact occurs when patrol officers themselves witness criminal activity and either make an arrest or issue a citation or warning to the offenders. There are also frequent casual contacts between patrol officers and citizens, much the same as occur among the general population in the daily course of work and living.

The first two types of contacts (answering calls for service and law enforcement) are generally accepted as clearly being the responsibilities of police officers, and casual contacts are usually welcomed as necessary and desirable communications between a police department and the public it serves. However, many patrol officers also engage in another, less well-accepted, form of citizen contact—the Field Interrogation (FI), sometimes called a field stop, field contact, or stop and frisk.

The San Diego Police Department defines *Field Interrogation* as a contact initiated by a patrol officer who stops, questions, and sometimes searches a citizen because the officer has reasonable suspicion¹ that the subject may have committed, may be

1. Reasonable suspicion is more than a hunch or mere speculation, but short of the probable cause required for an arrest. It is not susceptible of precise definition. The subject is discussed at length in the *Stop and Frisk* volume of Model Rules For Law Enforcement, developed by the College of Law, Arizona State University with Police Foundation support and published by the Foundation as a public service. The San Diego Police Department was one of the advising departments for the Model Rules project.

committing, or may be about to commit a crime. In San Diego, each FI contact that fails to result in either an immediate arrest or in totally removing the officer's suspicions about the subject is documented in a formal FI report. No FI report is made if the officer's suspicions are removed. This avoids including the names of innocent citizens in police department files. San Diego Patrol officers have traditionally been given extensive training in recognizing valid FI situations and in conducting the interrogations.

In many parts of the country, FI practices have been criticized as an abuse of citizen rights, as a detriment to police-community relations, and as a waste of patrol time. In response to these criticisms, advocates of FI practices have maintained that it helps deter potential criminals, helps apprehend known offenders, assists investigations, and is acceptable to the general public.

Because of the widespread interest and controversy concerning FI practices, the San Diego Police Department requested a grant from the Police Foundation to study some of the issues surrounding FI practices in the city of San Diego.

THE FIELD INTERROGATION STUDY

In April 1973, the Police Foundation provided a grant to the San Diego Police Department for a study of the major effects of three alternative departmental policies for conducting Field Interrogations:

- Continuation of traditional FI practices
- Conducting Field interrogations with patrol officers given special additional training to help minimize potential friction between the department and the public
- Suspension of all FI activities.

Each policy was to be evaluated in terms of its measurable effects on three factors: (1) those reported crimes considered as

suppressible² by the San Diego Police Department, (2) total arrest rates, and (3) police-community relations.

System Development Corporation (SDC) was selected as the evaluation contractor for the study. In performing its evaluation, SDC selected three patrol areas—a Control Area, A Special FI Area, and a No-FI Area—that were closely matched in terms of their demographic and socioeconomic compositions, and in their prior reported crime histories. The only controls imposed on these areas related to FI practices:

- In the Control Area, Field Interrogations were conducted with no change from normally practiced activities.
- In the Special FI Area, normal Field Interrogations were conducted only by officers who were given special supplemental FI training by Approach Associates of Oakland, California. This training focused on methods for reducing any potential friction between FI subjects and patrol officers.
- In the No-FI Area, Field Interrogations were suspended for the nine-month Experimental period.

Community attitude surveys were conducted in each of the areas both prior to and following the nine-month Experimental period, and a variety of data was collected for analysis:

- Pre-experimental, Experimental, and Post-experimental time period crime and arrest histories for each of the three study areas
- FI history for each of the three areas during the Experimental and Post-experimental periods
- History of complaints against the San Diego Police Department, with special reference to FI-generated complaints
- Observation reports of sampled FI encounters as witnessed by trained observers

2. Suppressible crimes are those that the San Diego Police Department has identified as potentially subject to reduction through police patrol activities. These include eight specific crime types: robbery, burglary, grand theft, petty theft, auto theft, assault/battery, sex crimes, and malicious mischief/disturbances. The subject is discussed further in Chapter V.

- Race/ethnicity and age characteristics of FI subjects in each of the three areas
- A sample of the "reasons for stop" of Field Interrogations conducted by Control and by Experimentally trained officers
- A sample of the details of arrests made in the study areas, including: the precipitating cause for arrest; the charges; the age, race/ethnicity and residence of subjects; and the resulting disposition of the case by the district attorney or city attorney
- A survey of police investigators on their use of and attitudes toward FI reports
- A tabulation of requests made by investigators to examine FI reports

SDC's analysis consisted of two principal types of comparisons: (1) the collected data were analyzed using statistical techniques to determine the significant changes that occurred within each study area between the seven-month Pre-experimental period, the nine-month Experimental period, and the five-month Post-experimental period; and (2) the changes occurring in each of the three areas were compared to identify differences that could be associated with either the suspension of FI activities or the conduct of Field Interrogations by specially trained officers.

SUMMARY OF FINDINGS

Reported Crimes

First, the suspension of Field Interrogations in the No-FI area was associated in time with a significant increase in the monthly frequency of total suppressible crimes.³ The resumption of Field Interrogations in the No-FI Area was associated in time with a significant decrease in the monthly frequency of total suppressible crimes. Monthly means of suppressible crimes

3. See Chapter V for a description of this category.

went from about 75 prior to the experiment to 104 when field interrogations were suspended and back to about 81 when they were resumed. For Part I suppressible crimes only (excludes malicious mischief/disturbances), monthly means went from 63 to 83 and back to 63.

Second, the monthly frequencies of total suppressible crimes did not change significantly in either the Control or Special FI Area during the time periods studied.

Third, the evaluation was inconclusive in identifying the specific types of suppressible crimes most influenced by the level of FI activity.

Fourth, the small sample of reporting areas and months was not sufficient to construct a conclusive model of the relationship between the frequencies of Field Interrogations and of suppressible crimes. However, the preliminary model indicates that suppressible crimes tend to decline one month after Field Interrogations are increased.

Reported Arrests

The monthly frequencies of total arrests in the study areas were not significantly influenced by the levels of FI activities; however, patrol officers departmentwide attribute 17 percent of their total arrests to contacts that began as Field Interrogations.

The quality of arrests resulting from FI contacts is slightly lower than for arrests in other circumstances: 30 percent of the subjects arrested as a result of a Field Interrogation are held-to-answer, as compared with 38 percent for arrests in all other circumstances.

The majority (62 percent) of the subjects of Field Interrogations were not residents of the area where they were stopped, while the majority (57 percent) of arrest subjects were local residents.

There were no significant differences with regard to race/ethnicity, age, or sex, between the subjects of Field Interroga-

tions and the subjects of arrests made by Special FI officers. However, the Control officers arrested significantly more Blacks, and significantly fewer Mexican-Americans and males, than they field interrogated. Less than two percent of Field Interrogations reported resulted in arrests.

Investigators' Use of Field Interrogation Reports

Changes in the frequencies and types of Field Interrogations did not have a major effect on police-community relations in any areas where measurements were conducted. The majority of citizens surveyed in all three study areas accepted Field Interrogations as a legitimate and properly conducted police activity and felt that an appropriate amount of police time is devoted to the practice.

The majority of all citizens who were the subjects of FI contacts felt that the contact was justified and properly conducted. No citizen complaints resulted from FI contacts made in either the Control or Special FI Area. Only three percent of all complaints departmentwide were related to FI activity.

Sample observations of FI encounters by SDC observers failed to identify any major differences in the Field Interrogations conducted by Control and Special FI officers. However, FI subjects reacted more favorably to interrogations conducted by Special FI officers than by Control Officers.

CONCLUSIONS

Suppressible Crimes

The analysis supports the hypothesis that some level of FI activity, as opposed to none, provides a deterrent effect on suppressible crimes in localized areas. Further study is recommended to investigate probable area-displacement effects and to identify the factors involved in determining the optimum levels of FI activities.

The analysis was inconclusive in identifying the specific types of suppressible crime most influenced by FI activities. However, there were indications that burglary, petty theft, and malicious mischief/disturbances—crimes frequently committed by two or more juveniles or young adults—may be the types most influenced.

Taking into account that most (approximately 83 percent) of the arrests in the department arise from other than FI activities (such as radio calls), and that more than 98 percent of Field Interrogations reported do not result in arrests, it is clear that whatever effects Field Interrogations have on suppressing crime stem mainly from the FI process itself.

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The current manual filing and retrieval system employed by the San Diego Police Department effectively prohibits any extensive use of FI reports by investigators. Under these conditions, it appears that the actual utility of FI reports to investigators is minimal, although the potential utility is considered to be high by the investigators themselves. Recently, investigators were provided an improved method (a computer-based system) for comparing FI report data with the suspect information contained in crime reports. The use of this computer-based system is being analyzed.

Police-Community Relations

The analysis showed that neither the frequency of Field Interrogations nor the type of FI training (regular or supplemental) given to patrol officers had a major influence on the attitudes and opinions of San Diego citizens about police activities, including the stopping and questioning of suspicious persons. There were some indications, however, that negative public reactions might develop if the currently low level of FI activities was greatly increased.

Since the subjects of Field Interrogations conducted by the Special FI officers tended to report the most favorable reactions to FI encounters, the San Diego Police Department should consider incorporating elements of the supplemental FI training into its regular training program.

USE OF STUDY FINDINGS IN OTHER CITIES

While the authors feel that the results of the experiment in all probability apply generally to San Diego, the question whether similar results would be obtained in other cities requires replication of the experiment if the cities in question are thought to be markedly different from San Diego with respect to two important characteristics.

- Field Interrogations are a traditional and generally well-accepted practice in San Diego.
- All San Diego police officers routinely receive extensive training in FI practices. The special training for the officers in the experiment represented, as it turned out, only an augmentation of the department's regular program. Therefore, this experiment was not a test of untrained versus FI-trained officers, but rather a test of regularly FI-trained versus more extensively trained officers.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1680

THE STATE OF MICHIGAN,

Petitioner,

—v.—

GARY DEFILLIPPO,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

**BRIEF FOR THE
AMERICAN CIVIL LIBERTIES UNION FUND
OF MICHIGAN, *AMICUS CURIAE***

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Supreme Court, U. S.
FILED

DEC 30 1978

MICHAEL RODAK, JR., CLERK

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1680

The State of Michigan,
Petitioner,

-v.-

Gary DeFillippo, Respondent

On Writ of Certiorari
to the Michigan Court of Appeals

BRIEF FOR THE
AMERICAN CIVIL LIBERTIES UNION FUND OF
MICHIGAN,
AMICUS CURIAE

INTEREST OF AMICUS

Amicus is a state affiliate (with
over 8,000 members) of the American Civil

Liberties Union, which has been active for nearly sixty years trying to preserve, protect and defend the basic liberties guaranteed by the Bill of Rights. In our view, the Fourth Amendment rights at issue in the present case are an essential component of the concept of liberty as it has been understood by the traditions of the American people and of Anglo-American law; and the rule requiring the exclusion of evidence obtained in violation of the Fourth Amendment is a condition sine qua non for the preservation of these rights.

Amicus (through its Metropolitan Detroit Branch) was granted leave to participate in this case in the Michigan Court of Appeals. The case presents questions going both to the validity of the Detroit ordinance under which respondent was arrested and searched without probable cause, and to the admissibility of evidence obtained through such an illegal search. The constitu-

tional invalidity of this type of ordinance has been thoroughly briefed by the parties both herein and in Brown v. Texas, No. 77-6673, and will not be addressed in this brief. A statement of our views with respect to the inadmissibility of evidence secured in reliance on such an ordinance may, however, be of aid to the Court in its consideration of the present case.*

STATEMENT OF THE CASE

This case involves the warrantless search of the person of Gary DeFillippo, an American citizen standing harmlessly on a back street in Detroit. The result of the search was the discovery of a small quantity of phencyclidine inside a package of cigarettes DeFillippo was carrying in his left breast pock-

*/Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

et. As a result of the search, DeFillippo was charged with possession of phencyclidine, a felony under Michigan law.

At the hearing on DeFillippo's motion to suppress, the officer who searched him testified that the search which discovered the phencyclidine was conducted pursuant to DeFillippo's arrest on a different charge. Specifically, he said, (A-9), DeFillippo had violated Ordinance No. 143-H, Chapter 39, Article I of the Code of the City of Detroit which authorizes arrests of a "person [who] is unable to provide reasonable evidence of his true identity" or who refuses to do so. However, DeFillippo was never prosecuted on that charge.

When the trial court denied DeFillippo's suppression motion, he took an interlocutory appeal to the Michigan Court of Appeals. The Michigan Court of Appeals held that the ordinance underlying DeFillippo's arrest was void for

vagueness, that the search conducted pursuant to the arrest was consequently illegal, and that the evidence discovered as a result of the search could not be used against him. The Michigan Supreme Court denied the State's application for leave to appeal on May 1, 1978. This Court granted the State's petition for a writ of certiorari on October 2, 1978. Insofar as the state court proceedings are concerned, the matter is still in an interlocutory posture.

SUMMARY OF ARGUMENT

An arrest pursuant to an unconstitutional ordinance is an unlawful arrest. Evidence seized during a search incident to such an arrest is inadmissible at a criminal trial. The Court has held that an arresting officer's subjective good faith, including reliance on an unconstitutional law, will not validate an otherwise unlawful search, or render evidence

seized incident to an unlawful arrest admissible. Beck v. Ohio, 379 U.S. 89 (1964); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); see Franks v. Delaware, 57 L. Ed. 2d 667 (1978). The deterrence rationale underlying the Fourth Amendment exclusionary rule fully supports exclusion of evidence seized under the circumstances presented by this case.

The courts below have not yet ruled on several important matters of state law which might obviate the need for a decision on constitutional grounds. Accordingly, at this interlocutory stage, the Court should dismiss the writ of certiorari as improvidently granted in order to avoid deciding these constitutional questions prematurely. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936), (Brandeis, J., dissenting).

ARGUMENT

- I. A SEARCH OF A DEFENDANT'S PERSON CANNOT BE SUSTAINED AS INCIDENT TO A LAWFUL ARREST WHERE THE ORDINANCE PURSUANT TO WHICH THE ARREST TOOK PLACE IS UNCONSTITUTIONAL; EVIDENCE SEIZED PURSUANT TO SUCH A SEARCH MUST BE SUPPRESSED EVEN IF THE ARRESTING OFFICER ACTED IN GOOD FAITH.

Except in a few carefully limited circumstances, warrantless searches are per se invalid. See, e.g., Mincey v. Arizona, 98 S. Ct. 2408, 2412 (1978); Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978). The rule requiring a warrant is subject to exceptions, but the only exception possibly applicable in DeFillippo is that which permits warrantless searches as an incident of lawful arrest. See Chimel v. California, 395 U.S. 752 (1969). This exception presupposes, however, a lawful arrest. Johnson v. United States, 333 U.S. 10, 15 (1948); Beck v. Ohio, 378 U.S. 89, 91 (1964). If the arrest had been valid, a search of the defendant's person would have been permissible under United States v. Robinson, 414 U.S. 218 (1973). However, the arrest was invalid because the underlying ordinance was unconstitutional. Accordingly,

under this Court's cases, the search was also invalid, and any evidence derived therefrom must be suppressed. The Michigan Court of Appeals so held. People v. DeFillippo, 80 Mich. App. 197, 203, 262 N.W.2d 921, 924 (1977); Joint Appendix (JA) 22.

The prosecution argues, however, that the search may be sustained on either of two grounds, even though the arrest was effected pursuant to an unconstitutional ordinance. It submits (1) that an arrest and concomitant search are not unlawful where the police acted in good faith, relying on an ordinance which was only later declared to be unconstitutional (Petitioner's Brief, pp. 8-13) and; (2) that even if the arrest was unlawful, in such circumstances the exclusionary rule ought not be applied to bar use at trial of evidence obtained as a result of the arrest (Petitioner's Brief, pp. 14-21). Acceptance of either of these arguments would require overruling prior decisions of this Court which have held, or assumed, that for purposes of determining both the validity of an arrest and the applicability of the exclusionary rule in a criminal trial "good faith on the part of the arresting officers is not enough." Henry v. United States, 361 U.S. 98, 102 (1959), Beck v. Ohio,

378 U.S. at 97; Almeida-Sanchez v. United States, 413 U.S. 266 (1973)

A. An Arrest Based On A Statute Subsequently Held Unconstitutional Is Invalid Under Both Michigan Law And The Fourth Amendment.

The prosecution's first argument concerns the legality of the arrest itself. An arrest in reliance on an ordinance not yet declared unconstitutional is said to be valid regardless of the actual unconstitutionality of the ordinance. The state contends that an officer's belief that he has power to arrest is a valid substitute for actual authority to arrest. That contention is without merit. The arrest is invalid under state and federal law.

1. The arrest is invalid under state law.

Although the issue is discussed by the prosecution wholly in constitutional terms, the validity of an arrest would seem to be, at least in the first instance, a question of state law. Within limits set by the Fourth Amendment, the power to arrest, and the validity of an arrest, is primarily defined by state law. Ker v. California, 374 U.S. 23, 37 (1963). The existence of

state law conferring authority to arrest is itself a requisite of valid arrest under the Fourth Amendment. Police have no general authority to arrest; they must be able to point to some specific provision, either of statute or common law, authorizing any action which interferes with personal liberty. This, at bottom, is the teaching of the General Warrant Cases, such as Entick v. Carrington, 19 How. St.Tr. 1030 (1765), which the Fourth Amendment was meant to incorporate. Officers do not have plenary power to engage in searches and seizures of either property or persons. They must be authorized to act by law, by state law: in this case, Michigan law.

Arguably, the decision below represents a judgment that arrest under a void ordinance is invalid by virtue of Michigan law, independent of the Fourth Amendment. The defendant was arrested under a city ordinance. The Michigan arrest statute limits an officer acting without warrant to arresting for misdemeanors, including ordinance violations, "committed in his presence." Mich. Comp. Laws Ann. § 764.15(a) (1968); see B. J. George, Michigan Criminal Procedure § 1:05(B)(2) (1978). The statute, like common law, does not appear to allow for even

reasonable error in cases of arrest for misdemeanor; it seems rather to require that the officer be absolutely "correct in his judgment that a crime is indeed being committed in his presence." G. Holmes & B. J. George, An Introduction to Michigan Civil and Criminal Procedure 239 (1974); Wise, "Criminal Law and Procedure," 1974 Ann. Survey of Mich. L., 21 Wayne L. Rev. 401, 411 (1975). If no crime was committed, the arrest is invalid. In People v. Dixon, 392 Mich. 691, 222 N.W.2d 749 (1974), the Michigan Supreme Court expressly excluded the possibility that under Michigan law "a police officer may arrest for the commission of a misdemeanor on probable cause," thereby adhering to the legislative requirement that a person be arrested for a misdemeanor only if he has actually committed it in the presence of an arresting officer. 392 Mich at 695, 222 N.W.2d at 750. Accordingly, it appears that Michigan continues to hold an officer to the strict standard of actual commission when he arrests for a misdemeanor.^{1/} If the law under which he purports

^{1/} People v. Carpenter, 69 Mich. App. 81, 244 N.W.2d 338 (1976), cited in Petitioner's Brief, p.9 n.3, concerns a felony arrest, and is therefore inapposite. It has been suggested that this statement in Dixon does not (footnote 1 continued on the following page)

to act turns out to be invalid, the arrest is consequently unlawful.

2. The arrest is invalid under the Fourth Amendment.

State law apart, arrest pursuant to an ordinance conferring unconstitutional powers on the police constitutes an independent violation of the Fourth Amendment. Good faith, even if relevant in determining the appropriateness of a particular remedy for the constitutional violation, does not "make otherwise lawful conduct illegal or unconstitutional," id. at 136, and it cannot make otherwise unlawful conduct lawful. The test of compliance with the Fourth Amendment is essentially objective. Under the Fourth Amendment, the facts known to the officer are always to be "judged against an objective standard." Terry v. Ohio, 392 U.S. 1, 21

(footnote 1 continued from previous page) necessarily preclude arrest on probable cause as to the in-presence commission of a misdemeanor. 2 State Bar of Mich. Special Committee for the Revision of Crim. Proc., Proposed Revisions of the Michigan Code of Crim. Proc. § 115 comment, at 144-48 (1976). On the other hand, it may. See Wise, "Criminal Law and Procedure," 1973 Ann. Survey of Mich. Law, 20 Wayne L. Rev. 365, 382 n. 106 (1974). At best, the Michigan law on point is unclear. Id. at 144.

(1968); Scott v. United States, 436 U.S. at 137; see also Henry v. United States, 361 U.S. 98, 102-03 (1959). "If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." Beck v. Ohio, 378 U.S. 89, 97 (1959). The test of compliance with a law which establishes standards of conduct is "external, and independent of the degree of evil in the particular person's motives or intentions." O.W. Holmes, The Common Law, 43 (M. Howe ed. 1963).

There are three groups of cases in which officers have nevertheless claimed reliance on a statute or ordinance only later declared unconstitutional:

(a) First, there are cases which say that an arrest is not invalid even though the law defining the crime for which the defendant was arrested is later declared unconstitutional. See, e.g., Johnson v. United States, 370 F.2d 489, 491 n.2 (D.C. Cir. 1966); Wright v. Bailey, 544 F.2d 737 (4th Cir. 1976). The theory seems to be that insofar as probable cause suffices for arrest, the police may be regarded as having acted on probable cause

when they relied on the law as it stood at the time of the arrest; although generally required to know the law, they are not required to anticipate the possibility that the law on which they rely will subsequently be held to be unconstitutional. The two cases cited by Petitioner from the Fifth Circuit, United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971) and United States v. Carden, 529 F.2d 443 (5th Cir. 1976), appear to accord with this position. See Petitioner's Brief, pp. 10-11. See also United States v. Dameron, 460 F.2d 294 (5th Cir. 1972).^{2/} However, Kilgen and Dameron are distinguishable as involving consent searches rather than searches incident to arrest, and therefore holding "only that invalidation of the underlying substantive statute does not vitiate the consent to search," Powell v. Stone, 507 F.2d 93, 98 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976); Carden, Wright, and most other federal cases outside the District of Columbia, supra, may be read as holding only

^{2/} Cf. Moffett v. Wainwright, 512 F.2d 496, 502 n.6 (5th Cir. 1975); and Hamrick v. Wainwright, 465 F.2d 940, 941-42 (5th Cir. 1972), in which the issue is mentioned but not reached.

that where a state defendant is arrested for one offense, searched, and then prosecuted and convicted for a wholly different offense, the validity of the law defining the offense for which he was initially arrested cannot be questioned through federal habeas corpus. Those cases are therefore irrelevant when a state court chooses to decide the constitutionality of the underlying ordinance, as did the court below.

(b) Second, there are cases in which the law defining the offence for which the defendant was initially arrested is unconstitutionally vague because it subverts not only notions of due process but also principles incorporated in the Fourth Amendment. These cases have typically involved vagrancy ordinances permitting, in effect, arrest on mere surmise about wrongdoing. The defendant is then prosecuted for a more serious offence based on evidence turned up during a search incident to arrest for violation of the ordinance. The most fully considered cases on point have permitted the validity of such an ordinance to be questioned in the ensuing proceedings. Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972) (en banc), noted in 18 Vill. L. Rev. 117 (1972), 47 N.Y.U.L. Rev. 595 (1972); United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974); Powell

v. Stone, supra; United States v. Margeson, 259 F. Supp. 256 (E.D. Pa. 1966); see also Worthy v. United States, 409 F.2d 1105, 1110 (D.C. Cir. 1968) (dissenting opinion). The police cannot be regarded as having acted on probable cause even if they relied on the ordinance where the very effect of the ordinance was to eliminate any meaningful requirement of probable cause as the standard for arrest.

(c) Finally, there are cases in which a statute has directly authorized searches and seizures in a manner incompatible with the principles of the Fourth Amendment. E.g., Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Sibron v. New York, 392 U.S. 40 (1968); Berger v. New York, 388 U.S. 41 (1967). In all of these cases a search was found invalid and evidence suppressed, notwithstanding the officer's good faith reliance on a statute which had not been declared unconstitutional at the time of the search.

Even if the present case were regarded as falling within the first or second of these groups, the Michigan Court of Appeals could still properly choose to consider, as it did, the constitutional validity of the arrest and search from which evidence against

the defendant was derived. In fact, the present case falls within the third category. Detroit Ordinance 143-H directly authorizes a particular type of search and seizure incompatible with the Fourth Amendment. Thus, a holding that the search is invalid, despite the officer's claim of reliance on a standing ordinance, is compelled by Almeida-Sanchez. The prosecution recognizes the similarity and its attempt to distinguish Almeida-Sanchez is unavailing. (Petitioner's Brief, pp. 11-13, 17-18). The Detroit ordinance is said to be primarily penal, aimed at defining criminal conduct, and not merely at authorizing search and seizure of persons who fail to produce adequate proofs of their identity. This distinction, however, is not persuasive. Like 8 U.S.C. § 1357(a), the statute involved in Almeida-Sanchez, the Detroit ordinance is immediately concerned with specifying official powers: it sets out the power of the police to demand evidence of "true identity" and to take into custody those who fail to produce such evidence. And although those who refuse to comply with an officer's demand for self-identification are said to act unlawfully, and are therefore subject to 90 days imprisonment and a fine of \$500 under the separate provisions of Detroit City Code § 1-1-7, resisting

a search under 8 U.S.C. § 1357(a) is also an offence, punishable by three years imprisonment under the separate provisions of 18 U.S.C. § 2231. See, e.g., Gibilterra v. United States, 428 F.2d 393 (9th Cir. 1970) (prosecution for resisting border searches). The Fourth Amendment would be reduced to "a form of words," Mapp v. Ohio, 367 U.S. 643, 648 (1961); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1919), if a legislature could immunize unconstitutional police search practices from challenge simply by making it a crime not to submit to them, confident that state officials would prosecute only for other substantive offenses.

B. Evidence Seized In A Search Incident To An Unconstitutional Arrest Is Subject To Exclusion At Trial Even If The Arresting Officer Acted In Good Faith.

The prosecution's second argument concerns the applicability of the exclusionary rule. Even if the defendant's arrest was invalid, it is said that the exclusionary rule should not apply to bar the use of evidence obtained as a result of his illegal detention "where the officer acted in good faith reliance on an ordinance not yet declared unconstitutional." Petitioner's Brief, p.14. This conclusion is said to follow from recent statements by this

Court to the effect (a) that the primary purpose of the exclusionary rule is to deter unlawful police conduct, United States v. Calandra, 414 U.S. 338, 347 (1974); United States v. Janis, 428 U.S. 433, 446 (1976); Stone v. Powell, 428 U.S. 465, 486 (1976); (b) that unlawful conduct may not be deterrable where official action is "pursued in complete good faith," Michigan v. Tucker, 417 U.S. 433, 446 (1974), and (c) that, therefore, the exclusionary rule ought not apply unless the officer knew or should have known that the search in which he engaged was unconstitutional, United States v. Peltier, 422 U.S. 531, 542 (1975).

This Court has held that a constitutional right to be secure against illegal searches necessarily requires the government to relinquish any advantage it may have gained "over the object of its pursuit by doing the forbidden act," Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1919), and to refrain from using "knowledge obtained by that means which otherwise it would not have had." Id. at 391. Silverthorne held, and commentators have agreed, that an accused's right to be restored so far as possible to the position he was in prior to an illegal search

is the foundation of the exclusionary rule. See, e.g., Schrock & Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251 (1974). Government cannot assume a license to interfere with constitutional rights, even if it were willing (which it is not) to pay for the privilege. The requisite form of redress for a violation of the Fourth Amendment is therefore a sanction against governmental use of evidence acquired through constitutionally forbidden means.

More recently, the Court has explained the exclusionary rule as a "deterrent safeguard", Mapp v. Ohio, 367 U.S. 643, 648 (1961): not a perfect deterrent to be sure, but given the impotence of available alternatives, one "without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'" Calculations about whether its deterrent objectives will be served have recently been the decisive considerations in determining the types of cases in which the exclusionary rule should be applied.

The notion that the exclusionary rule ought not apply where its incremental efficacy as a deterrent may be doubted has been adopted only with respect to peripheral uses of

illegally obtained evidence: United States v. Calandra, 414 U.S. 338 (1974) (grand jury proceedings); United States v. Peltier, supra, (retroactive applicability of Almeida-Sanchez v. United States); United States v. Janis, 428 U.S. 433 (1976) (state-seized evidence in an IRS assessment proceeding); Stone v. Powell, supra, (collateral federal review of state convictions); United States v. Ceccolini, 435 U.S. 268 (1978) (live-witness testimony tenuously connected with the initial illegality). None of these cases involves a motion to suppress direct use of unconstitutionally seized evidence in a criminal trial uncomplicated by the problem of retrospectivity at issue in United States v. Peltier.

Notwithstanding recurrent suggestions for change, claims of good faith on the part of arresting officers have never been held sufficient reason for suspending operation of the exclusionary rule in the criminal trial.^{3/}

^{3/} It has been suggested that, even in a criminal trial, the deterrent purposes of the exclusionary rule might not be impaired if it were restricted to cases of "egregious, bad-faith conduct" (Stone v. Powell, supra at 501 (Burger, C.J., concurring)), or not applied where evidence was seized by an officer having reasonable grounds for a "good faith belief that his conduct comported with existing law" (footnote 3 continued on next page)

See, e.g., Beck v. Ohio, 378 U.S. 89, 97 (1964). The criminal trial has always been the paradigmatic case for full application of the exclusionary rule. The decisions of this Court "recognize no exception to the rule that illegally seized evidence is inadmissible at trials." Davis v. Mississippi, 394 U.S. 721, 723 (1965). An exception of the sort urged here by the prosecution would require reversal of Almeida-Sanchez v. United States, 413 U.S. 266 (1973); the distinction between DeFillippo and Almeida-Sanchez proposed by petitioner is wholly fictitious. See supra at 17. And the proposed exception would be inconsistent with two decisions of this Court last term. In Mincey v. Arizona, 98 S. Ct. 2408 (1978), evidence was held inadmissible even though it

(footnote 3 continued from previous page) (id. at 538 (White, J. dissenting)), or where there was only a "technical" violation of the Fourth Amendment by an officer acting in good faith "pursuant to a statute that subsequently is declared unconstitutional" (Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring)). See also H. Friendly, Benchmarks 261 (1967); ALI Model Code of Pre-Arraignment Procedure § 290.2 (Proposed Official Draft 1975); Israel, "Criminal Procedure, The Burger Court, and the Legacy of the Warren Court" 75 Mich. L. Rev. 1319, 1408-1415 (1977).

was obtained by officers whose claim to have acted in good faith reliance on previous decisions of the state Supreme Court was not seriously in doubt. See id. at 2412 n.4. And in Franks v. Delaware, the Court held that evidence seized under a facially valid warrant must be suppressed if the warrant is based on an affidavit containing intentional misstatements, even if the searching officer acted in good faith (i.e., was not responsible for or aware of the misstatements). Franks v. Delaware, 57 L. Ed. 2d 667 (1978).

What the prosecution proposes, then, is a novel exception to the exclusionary rule in direct conflict with previous -- and recent -- decisions of this Court. This exception would permit a plea of official error juris, at least in certain circumstances, to bar application of the exclusionary rule in a criminal trial. Such an exception is said to be a matter of bringing the operation of the exclusionary rule into line with its predominantly deterrent purpose. But even assuming, arguendo, that the sole objective of the exclusionary rule is to deter official misconduct, that objective would be better served by application of the exclusionary rule in criminal trials, than by creation of a new exception to that rule, based on the claim that public officials acted in good faith.

Analogy to the criminal law is instructive. The exclusionary rule, like the criminal law itself, aims ex hypothesi to reduce the frequency of prohibited types of behavior.^{4/} Criminal law, like the exclusionary rule, may also serve other purposes, but reducing the incidence of misbehavior is generally conceded to be its primary objective.

Sanctions aim at preventing offenses either by others ("general prevention") or by the offender himself through means of (a) intimidation (i.e., "specific deterrence"), (b) reformation, or (c) incapacitation. Insofar as it aims at deterring future misconduct, the exclusionary rule is largely a matter of "general prevention." Doubts have been expressed about the deterrent efficacy of the exclusionary rule. But equally serious doubts have been expressed about the capacity of the criminal law itself to deter criminality, and no one has suggested scuttling the criminal law. On the contrary, it is currently urged on all sides that general prevention (although limited by the concept of desert) ought to be regarded as the only sufficient controlling

^{4/} Cf. N. Walker, Sentencing in a Rational Society 3-4 (1971).

aim of any rational system of punishment.^{5/} This current emphasis in criminological theory on general prevention is based on recognition that the preventive effects of punishment are not limited to its intimidating influence on those offenders who engage in conscious utilitarian calculation about the prospective costs and benefits of pursuing illegal activity. General prevention is a complex process, involving more than the threat of sanction to restrain potential offenders who happen to be directly influenced by it. Punishment also serves as an educative, socializing, conditioning force, helping to form and strengthen inhibitions and to sustain habits of law-abiding behavior on the part of those not normally disposed to commit offences.^{6/}

^{5/} See, e.g., Struggle for Justice: A Report on Crime and Punishment in America Prepared for the American Friends Service Committee 48-66 (1971); N. Morris, The Future of Imprisonment, 58-84 (1974); A. von Hirsh, Doing Justice: The Choice of Punishments, 35-55 (1976); Fair and Certain Punishment: A Report of the Twentieth Century Fund, (1976); H. Gross, A Theory of Criminal Justice, 375-412 (1978).

^{6/} See, e.g., H. Packer, The Limits of the Criminal Sanction, 35-45 (1968); F. Zimring & G. Hawkins, Deterrence, 74-89 (1973); J. Andenaes, Punishment and Deterrence, (1974).

Similarly, the exclusionary rule operates not so much by promoting nice Benthamite calculations about the consequences of misconduct, as by fixing, supporting, and reinforcing behavioral standards through the emphatic condemnation of violations, backed by a concrete sanction without which there would be no reason to believe the law really takes its professed standards seriously.

In short, the general preventive purpose behind both criminal law and exclusionary rule is most likely to be served by insisting on compliance with the relevant rules. Where the object is supposed to be simply the prevention of prohibited results, strict liability is imposed even in criminal cases.^{7/} It is imposed not only in connection with regulatory offences, but whenever strict compliance is sought.

Objections to strict liability are based mainly on considerations of fairness to the individual accused. It is thought to be unjust to punish someone for a result which was not really his fault. The concept of

^{7/} See, e.g., United States v. Balint, 258 U.S. 250 (1922); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975).

desert is urged as a limit to what may be done in order to further strictly preventive purposes. Objections in terms of fairness to the accused do not really apply, however, to operation of the exclusionary rule, since the individual officer is not being punished personally. Insofar as the exclusionary rule is open to the same objections as strict liability, the relevant objections are those which suggest that the general aim of deterrence cannot possibly be realized in cases of mistake. Strict liability, it is said, cannot serve to deter a defendant who did not know or have reason to know he was breaking the law. Yet it may serve not only to promote "a greater degree of care", on the part of the enterprise subject to regulation,^{8/} but also to influence attitudes concerning the importance of compliance and to reduce occasions for evasion and self-deception.

It is also said that deterrence may not require exclusion where an officer acts in "complete good faith" (see, e.g., Michigan v. Tucker, 417 U.S. 433, 446 (1974)); but the term "good faith" is largely vacuous except as it serves to preclude heterogenous forms of

^{8/} Michigan v. Tucker, 417 U.S. 433, 447 (1974).

"bad faith".^{9/} Presumably the form of "bad faith" here contemplated is a search by officers who "had knowledge, or may properly be charged with knowledge that the search was unconstitutional." Cf. United States v. Peltier, 422 U.S. at 542. Thus, as with strict liability generally, the question is not so much whether strict insistence on compliance is likely to encourage greater diligence -- it clearly is likely to do so -- but rather one of the differential effectiveness of strict liability in fostering compliance, as compared with a rule permitting those who violate a rule to show that they exercised all the prudence that might reasonably be expected of them.

Cases and statutes imposing strict criminal liability or otherwise dispensing with the need to show awareness of wrongdoing take it for granted that deterrent efficacy will be significantly impaired by permitting a defense based on even reasonable mistake. Similarly with the exclusionary rule. "The difficulties of establishing the knowledge and purpose of the police, the likely tendency of the police to risk more because of these difficulties, and questions about the will of many lower-court judges to enforce

^{9/} Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code," 54 Va. L. Rev. 195 (1968)).

the rules as intended" are among the problems which "give rise to grave doubts about the viability" of restricting the exclusionary rule "to situations in which the police are found to have acted willfully or at least negligently." Allen, "Foreword -- Quiescence and Ferment: The 1974 Term of the Supreme Court," 66 J. Crim. L. & Crim. 391, 398 (1975).

So restricting the exclusionary rule would impair its efficacy as a deterrent not simply by inviting officials to gamble on the possibility that a court may be persuaded to find only fortuitous blundering where there was really a low standard of care, or worse, in the observance of constitutional guarantees. The most important deterrent effects of the exclusionary rule are or will be realized through its capacity ultimately to alter and affect not wholly conscious opinions, attitudes, and habits of compliance. Cf. Oakes, "Studying the Exclusionary Rule in Search & Seizure," 37 U. Chic. L. Rev. 664, 756 (1970). Constructing epicycles to the exclusionary rule and institutionalizing occasions for giving vent to doubt concerning the rationality, predictability, validity, or importance of

underlying Fourth Amendment guarantees can only serve to foster not compliance, but confusion.

Nor does the specific claim in DeFillippo, of reliance on an unconstitutional ordinance not yet declared to be so by a court, constitute a special case where those responsible for violation of the Fourth Amendment can say that it was objectively impossible for them to act otherwise than they did. If the ordinance had been previously sustained by the courts (as was, for instance, the ordinance in United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971)), there might be a case of truly invincible error, although even here decisions of this Court indicate that the exclusionary rule will normally apply. See supra, at 22-23. In the present case, the ordinance in question had never met with prior approval at any level of the judiciary. Its enactment and enforcement in effect represent a gamble by the Detroit Common Council that a practice of questionable constitutional validity might possibly survive judicial review, or perhaps never be subjected to it. It may be true, as the prosecution claims, that individual officers cannot be faulted for acting in accordance with the law as it

stands on the books. But the Fourth Amendment does not apply only to policemen; it applies to legislators and administrators as well. Similarly, preventive effects of the exclusionary rule do not operate solely on individual officers. The key to the rule's effectiveness lies in its capacity to influence the attitudes, habits and traditions of society as a whole and particularly those of the law enforcement community of which the individual officer is a part. Thus this Court has rightly emphasized the importance in the long run of encouraging "those who formulate law enforcement policies," as well as "the officers who implement them, to incorporate Fourth Amendment ideals into their value system." Stone v. Powell, 428 U.S. 465, 492 (1976). And in the ALI's Model Code of Pre-Arrest Procedure § 290.2 (3) (Proposed Official Draft 1975), a violation which "appears to be part of the practice of the law enforcement agency or was authorized within it" is regarded as willful "regardless of the good faith of the individual officer." Even if invincible ignorance of law were to constitute an exception to the operation of the exclusionary rule, it is, in line with the rule's deterrent purposes, government as a whole which must be looked to in deciding whether those responsible for a

particular action are properly chargeable with knowledge that it would violate the Fourth Amendment.

II. THE COURT SHOULD DISMISS
THE WRIT OF CERTIORARI AS
IMPROVIDENTLY GRANTED BECAUSE
THE RECORD PRESENTS UNRE-
SOLVED QUESTIONS OF FACT
AND STATE LAW.

Detroit's Ordinance No. 143-H does not authorize the police to conduct stops of citizens to check their identity unless the officer has "reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity." Whether the arresting officer in fact had such reasonable cause in this case is a question that has not yet been resolved. Were the Michigan courts to find that there was no "reasonable cause" to believe that the Defendant's behavior "warrant[ed] further investigation for criminal activity," it would be unnecessary for this Court to rule upon the constitutionality of the ordinance. And it would also be unnecessary for the Court to consider the implications holding the ordinance uncon-

stitutional would have for the Fourth Amendment exclusionary rule.

Accordingly, because a substantial, unresolved question of the application of the Detroit ordinance to the facts of this case may make resolution of the difficult constitutional questions presented here unnecessary, the writ of certiorari should be dismissed as improvidently granted. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) ("The Court will not anticipate a question in advance of the necessity of deciding it.") (Brandeis, J., dissenting).

CONCLUSION

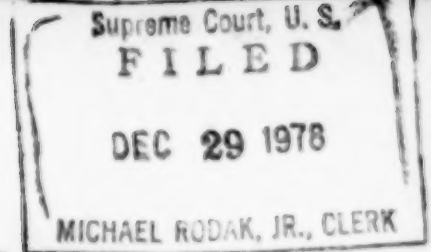
THE DECISION BELOW SHOULD BE
AFFIRMED OR, IN THE ALTERNATIVE,
THE WRIT OF CERTIORARI SHOULD BE
DISMISSED AS IMPROVIDENTLY
GRANTED.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1978
No. 77-1680

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

GARY DeFILLIPPO,

Respondent.

**Brief of the National Legal Aid and Defender Association
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IN THE
Supreme Court of the United States

October Term, 1978
 No. 77-1680

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

GARY DEFILLIPPO,

Respondent.

Brief of the National Legal Aid and Defender Association as Amicus Curiae in Support of Respondent.

Interest of Amicus Curiae and Consent.

The National Legal Aid and Defender Association is a nonprofit corporation, formed, *inter alia*, to assist defender offices in the United States in their efforts to secure the constitutional rights of indigent defendants by vigorous and competent representation.

A decision by this court in the instant case could have a substantial and perhaps devastating impact upon the rights of all citizens to be free from unreasonable searches and seizures of their person. Accordingly, the National Legal Aid and Defender Association is filing this brief as *amicus curiae* pursuant to the authority

of its governing board and the vote of its Committee on Briefs Amicus Curiae.

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to the filing of this brief has been given by the Office of the prosecuting attorney for the County of Wayne, Michigan, counsel for petitioner, and by James Howarth, Esq., counsel for respondent. Letters of consent from both counsel should be on file with the Clerk of this Court.

ARGUMENT.

I

THERE IS NO EFFECTIVE REMEDY OTHER THAN THE EXCLUSIONARY RULE FOR FOURTH AMENDMENT VIOLATIONS ACCOMPLISHED PURSUANT TO A CITY ORDINANCE APPARENTLY DESIGNED TO AUTHORIZE THEM.

A. The Scope of Authority Provided Under the Ordinance Exceeds Constitutional Limits.

At the time of the defendant's arrest, Detroit Municipal Code section 39-1-52.3 provided:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, *the police officer may transport him to the nearest precinct in order to ascertain his identity.*"

(*People v. DeFillippo* (1977) 80 Mich.App. 197, 200-201 (emphasis added).)¹

The ordinance thus gives awesome authority to the police in their daily contacts with citizens. The power of inquiry granted the police officer is not limited;

¹A 1976 Amendment added an express provision to make it a crime to refuse to identify oneself, but the Michigan Court held that refusal to identify oneself was "implicit" in the ordinance as it read at the time of the defendant's arrest. (80 Mich.App. 197, 201, n. 1.)

there is no adherence in the ordinance to the requirements of *Terry v. Ohio* (1968) 392 U.S. 1 and *Adams v. Williams* (1972) 407 U.S. 143, that stops be *brief* in nature, that they be based upon some objective, articulable belief that the person stopped is engaged in criminal activity, and that any search of the person conducted incident to such a stop be limited to a protective "patdown" for weapons.

"There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, *the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest*, although it may alert the officer to the need for continued observation." (*Terry v. Ohio* (1968) 392 U.S. 1; 34 (Justice White concurring) (emphasis added).)

The *Terry* principle was restated in *Adams v. Williams*, *supra*, 407 U.S. 143, 146: "[¶] A *brief* stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." (407 U.S. 143, 146 (emphasis added).)

In its brief, Michigan emphasizes only those passages in *Terry* and *Adams* which permit the determination of identity (Petitioner's Brief 25, n. 10); petitioner

fails to concentrate on the critical language which specifies that only a "brief stop" is permitted; the "brief stop" is allowed in order to maintain the status quo *momentarily*, thus emphasizing the short permissible duration of the contact.

Contrary to *Terry*, the ordinance here appears to authorize full, custodial arrests on vague "suspicion" of nothing in particular except a failure to verifiably identify oneself. Thus, it is intended to permit the type of full-scale personal search as was conducted here upon vague grounds not amounting to probable cause; such searches are only permissible when incident to a *lawful* custodial arrest. The ordinance fails sight of the fact that custodial arrest is only constitutional where there is probable cause of commission of a specific offense. (*United States v. Robinson* (1973) 414 U.S. 218.)

The ordinance also contains a number of other ambiguities which provide the potential for further abuse. In addition to its failure to describe the extent of the inquiry permitted to the police officer, neither is guidance provided as to what the citizen must provide in the way of information in order to escape arrest. For example, our soldiers are taught that in the event of capture they must give only their "name, rank and service number". If a citizen answered a Detroit officer in such a manner, what is to prevent the officer from deeming the response unsatisfactory, and jailing the citizen? Under the rubric of an "identity inquiry" police questioning could extend into areas other than identity and constitute a serious invasion of the person's privacy. Being menaced with detention, the citizen responding to an officer so empowered would be hard pressed *not* to provide whatever information was re-

quested, a situation made the worse by lack of any requirement that the citizen be advised that he has Fifth Amendment rights not to answer any question calling for self-incrimination.

B. The Fourth Amendment May Not Be Evaded Through "Good Faith" Reliance by Officers on Unconstitutional Fiat of the Legislative or Executive Branches.

While noting in their brief that not even an "act of Congress can authorize a violation of the Constitution" (Petitioner's Brief at 12-13, Citing *Alameda-Sanchez v. United States* (1973) 413 U.S. 266, 272), it is evidently Michigan's intent to argue here that an ordinance of the City Council of Detroit can; or at least that it can do so free from sanction.

We begin our response to this assertion with the observation that it has never been held that the executive branch of state government may take unconstitutional action and then "sanitize" the fruits of an ensuing search by reliance on the "good faith" of searching officers. (See *Coolidge v. New Hampshire* (1971) 403 U.S. 443.) In *Whiteley v. Warden* (1971) 401 U.S. 560, 568, it was held that "good faith" reliance on a radio bulletin was insufficient to insulate a challenge to an otherwise unlawful arrest. Moreover, if officers make a search pursuant to a judicial warrant not founded upon probable cause, their good faith does not defeat a challenge to the search. (*Aguilar v. Texas* (1964) 378 U.S. 108; *Spinelli v. United States* (1969) 393 U.S. 410.)

As the Court said in *Henry v. United States* (1959) 361 U.S. 98, 102, "Good faith on the part of the

arresting officers is not enough." Or, as Justice Stewart said for the court in *Beck v. Ohio* (1964) 379 U.S. 89, 97: "[¶] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects, only in the discretion of the police.'"

If actions of magistrates or executive officers cannot authorize "good faith" unlawful searches free from the sanction of the exclusionary rule, then it should follow *a fortiori* that the actions of a deliberative body such as a legislature or council cannot do so. For the legislative body is not usually faced with the necessity to act quickly according to the exigencies of a particular situation; it may take all the time it likes to deliberate and receive the considered advice of counsel.

1. The Fiats of Town Councils Are Subordinate to the Commands of the Constitution, Not Vice-Versa.

There may indeed be appeal in the argument that the policeman on the beat should not be required to be a seasoned constitutional lawyer, weighing during each street encounter the authority granted him by statutes in light of the commands of the commerce clause (Art. I, § 8) and scores of other provisions which are, in light of the policeman's training and duty, quite arcane.

That, however, is not the issue presented by this case.

The narrow question before this Court is: when a policeman acts pursuant to a statute or ordinance the express purpose of which appears to be the *authorization* of unconstitutional searches and seizures of the

person,² may the fruits of such an unlawful search be used in a court of law during a criminal prosecution of the illegally-searched citizen? We believe that to hold the Fourth Amendment does not apply, or that the exclusionary rule is not available to enforce it in such a case, is to hold starkly that one of the most important constitutional assurances of both governmental integrity and personal liberty is no stronger than the whim of any town council which desires to overthrow it.

It is a considerable understatement to say that such a state of affairs does great violence to the constitutional precept (Art. VI) that it shall be the constitution which limits the power of town councils, and not town councils which limit the power of the constitution.

C. Michigan's Position, if Adopted by This Court, Might Result in the "Last Straw" Which Could Produce Effective Nullification of the Fourth Amendment.

In recent times, the Court has followed a trend narrowing the Fourth Amendment by interpretation which has reached a point which many reasonable citizens consider to be the precipice of outright negation.³ For example, the "papers and effects" of citizens which they have been forced by the demands of our

²As this Court unanimously pointed out in *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 169, "A direction by a legislature to arrest all 'suspicious persons would not pass constitutional muster". See also discussion under sub-part "A", *ante*.

³We are of course reminded here of Erskine's observation, made during the trial of Thomas Paine, that arbitrary power is never introduced into a country all at once; always it is introduced in slow steps, lest the people see its approach. (*The Trial of Thomas Paine* (1792) 22 How. St. Tr. 358, 443.)

modern economy to place in the hands of banks are subject to summary government seizure without notice, warrant, or even probable cause. (*United States v. Miller* (1976) 425 U.S. 435.) A government wishing to harass and intimidate its people by compiling dossiers of their associations, habits and beliefs now has only to visit the corner bank in order to do so.

The right of the people to an unfettered free press has also been impaired by authority granted by this Court to conduct surprise raids upon the files of journalists pursuant to search warrant; *Zurcher v. Stanford Daily* (1978) U.S. [56 L.Ed.2d 525]. By clear implication, other constitutional interests such as the right to counsel and to the free exercise of religion are equally jeopardized, in that there appears no impediment to similar searches of the confidential files of attorneys or clergymen.

And of course there will be no lawsuit allowed in any federal court against a prosecutor who intentionally procures the issuance of a warrant to search such files without probable cause, nor against a magistrate who willfully issues such a warrant: both have been cloaked with absolute immunity from responsibility by decisions of this Court. (*Imbler v. Pachtman* (1976) 424 U.S. 409; *Stump v. Sparkman* (1978) U.S. [55 L.Ed.2d 331].⁴

In another decision, it was held that a "waiver" of whatever Fourth Amendment rights may be retained by the people may be obtained by leaving the person giving up those rights totally unaware that he has the right to do anything but submit meekly to officers'

⁴The legislators who enacted this ordinance are also immune from responsibility in damages. (*Tenny v. Brandenhove* (1951) 341 U.S. 367.)

assertions of authority. (*United States v. Watson* (1976) 423 U.S. 411.) In *South Dakota v. Opperman* (1976) 428 U.S. 364, it was held that a full search of an automobile may be conducted without probable cause that it will reveal anything in particular, for mere "caretaking" purposes. Also, the occupants of any vehicle may be ordered out of it routinely. (*Pennsylvania v. Mimms* (1977) U.S. [54 L.Ed.2d 331].)

Most recently, the right of the people to be secure in their own homes has been greatly compromised by a holding that the Fourth Amendment has little to say about the unreasonable search of an auto or home unless the government then uses the fruits of that search as evidence against the auto- or homeowner in a criminal prosecution. (*Rakas v. Illinois* (1978) U.S. [47 U.S.L.W. 4025].) Once Fourth Amendment interests have been irreparably invaded, the victim, if he is not prosecuted, is to be left primarily to state remedies of trespass (.... U.S. [47 U.S.L.W. at 4027]) which may be legally blocked by sovereign immunity; and which are almost always practically blocked by the outrageously prohibitive cost to the private person of engaging in civil litigation.

Now the state of Michigan has come to this Court to urge that there is nothing wrong in the light of the Fourth Amendment with an ordinance conferring the power on police not to just briefly stop on the street but to fully search and then physically incarcerate a citizen whose presence on the public street is vaguely "suspicious" to an officer; though such "suspicion" is not sufficiently coherent to authorize an arrest for any definable public offense. Michigan thus seeks to stretch the inch of reasonable authority granted by

Terry v. Ohio, supra, (1968) 392 U.S. 1 into an oppressive mile. In the alternative, they argue that even if there is something wrong with such an enactment, they should be freely allowed to use the fruits of extensive personal searches of those they arrest pursuant to it, at least until someone with the wherewithall to do so manages to invent a way to get into court and have the ordinance declared unconstitutional in some binding manner.

Because of the possibly fatal damage the urged substantive construction of the Fourth Amendment will do, and because there is in practical fact no effective remedy left other than the exclusionary rule—petitioner certainly suggests none—both arguments must fail.

D. The Exorbitant Expense of Civil Litigation, as Well as the Maze of Doctrinal Obstacles to Effective Relief, Render Such Litigation Ineffective to Enforce the Commands of the Fourth Amendment; the Exclusionary Rule Is the Only Workable Remedy.

It is perhaps well to begin this part with a brief review of the thought which has led this Court to fashion the exclusionary rule as a means of enforcement of the Fourth Amendment. That no other effective means of enforcement has yet been devised, despite the long lament of those who think the enforcement of the criminal law against individuals should take precedence over the enforcement of the constitution against officers of the government, should be proof enough of the soundness of this reasoning.

In *Weeks v. United States* (1914) 233 U.S. 383, 393 the Court stated:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

Then, in *Mapp v. Ohio* (1961) 367 U.S. 643, in an opinion which outlines the history and development of the Rule, the Court voiced through Mr. Justice (and former Attorney General) Clark, the continuing sentiment that the Fourth Amendment was self-executing:

"Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'." (367 U.S. at 655.)

Given these pronouncements on the fundamental character of our constitutional charter, it would seem anomalous that the city of Detroit, through an ordi-

nance, could effectively overrule and abrogate the Fourth Amendment by so little as the enactment of this ordinance.

1. The Exclusionary Rule Was Designed to Serve the Imperative of Judicial Integrity by Insulating the Courts From Participation in Violations of the Fourth Amendment.

In *Weeks*, the United States Marshal, an officer of the court, improperly secured evidence by an unlawful search and seizure and the Court held the evidence inadmissible. The Court held: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action." (233 U.S. 383, 894.) Of course, the same purpose was acknowledged in *Mapp v. Ohio*, *supra*, 367 U.S. 643, 648-649, 659-660, following the Court's recognition of "the imperative of judicial integrity" in *Elkins v. United States* (1960) 364 U.S. 206, 222.

The failure of our system of justice to bring to account those who violate both the Constitution and the rights of privacy of others may have awesome consequences. Perhaps the best articulation of this principle was made by Mr. Justice Brandeis in his dissenting opinion in *Olmstead v. United States* (1928) 277 U.S. 438, 485:

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites

every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.”

2. The Cost of Civil Litigation and the Ability of Government Officers to Out-Litigate Private Citizens.

As an alternative to the exclusionary rule in criminal cases, some have suggested a substitute civil action against the government with a maximum limitation on recovery. A civil rights action against state officers exists under 42 U.S.C. § 1893 (See *Monroe v. Pape* (1961) 365 U.S. 167), and since 1971 an action for money damages may be brought against a federal officer for violation of the Fourth Amendment. (*Bivens v. Six Unknown Named Agents* (1971) 403 U.S. 388.) Such an action is not, however, available here against the legislative body which clothed the officer with unconstitutional powers (*Tenny v. Brandenhove* (1951) 341 U.S. 367), and the officers may use good faith reliance on the unconstitutional ordinance as a defense in an action against them.

In *Norton v. United States* (4th Cir. 1978) 581 F.2d 390, cert. den., U.S. (1978), an action was brought by a person whose apartment was forcibly entered without a search warrant by officers with drawn guns. The action was filed against state officers (42 U.S.C. § 1983) and federal officers (*Bivens*) as well as against the United States under the 1974 amendment to the Federal Tort Claims Act (28

U.S.C. 2680(h)). The Court of Appeals held that in civil actions against the individual state or federal officers, the officers had the “good faith” defense available to them, i.e., the officers acted in good faith with a reasonable belief of the lawfulness of their conduct. (581 F. 2d at 390, 393, n. 2.) The Court also found that the defense was available to the United States. The “good faith” defense has thus swallowed whole potential civil actions against officers for Fourth Amendment violations, for no police officer can be expected to admit his own bad faith and proof of the contrary would require E.S.P.

And of course the initiation of a federal civil action entails many substantial expenditures; though the defendant officers may have a right to government-paid counsel, the plaintiff does not. The inherent costs are an overwhelming deterrent to such litigation. Practicing lawyers experienced in litigation of this nature know that the attainment of compensatory damages, let alone the cost of litigation, is generally an illusory hope.

The criminal case admittedly provides a limited forum for obtaining redress for those subject to illegal police searches, but something is better than nothing. For example, the instant criminal action was the vehicle for the so-far successful challenge of this impermissible and unconstitutional ordinance; and it is a fair bet that further unlawful acts against innocent citizens pursuant to it have been curtailed due to the desire of officers to make arrests which will “stick” rather than arrests which will be “thrown out”.

The defendant in a criminal case, after all, has a strong motivation to enforce his rights; and he also has a lawyer to aid him in doing so. This Court has said that Fourth Amendment remedies should be

those which individuals are motivated to use. (*Alderman v. United States* (1969) 394 U.S. 165, 174.)

The low chance for substantial recovery and the high cost of maintaining civil litigation combine to motivate citizens *not* to use it as a means of enforcing the Fourth Amendment.

3. The Doctrinal Obstacles to Effective Civil Redress Are in Any Event Insurmountable.

Myriad pitfalls and roadblocks which have been erected under such rubrics as "standing" and "comity" make it highly questionable that a binding judicial declaration of unconstitutionality of this ordinance could ever be obtained except in the context of the invocation of the exclusionary rule.

For example, according to a majority of this Court, even a showing of a consistent, non-isolated pattern of unconstitutional abuse in the implementation of this ordinance would not create such a "case or controversy" under Article III as would authorize an injunction against such practices. (*Rizzo v. Goode* (1976) 423 U.S. 362.) Citizens feeling generally chilled or inhibited from the exercise of their rights to free passage over the public ways could be barred from relief on grounds their claims were "conjectural" or "hypothetical." (*O'Shea v. Littleton* (1973) 414 U.S. 488, 494; *Younger v. Harris* (1971) 403 U.S. 37, 41-42.)

Of course, those like respondent who are so directly and immediately chilled in the exercise of their rights as to be the subject of actual prosecution in a state court would be barred from suing to enjoin such prosecution on grounds of unconstitutionality by the doctrine of comity, as set out in the main holding of *Younger v. Harris*, *supra*. Such persons would be left to vindicate

their rights in the course of the pending state proceeding; but if Michigan's anti-exclusionary rule argument prevails here, there will be no means left of doing so.

On paper, one could construct a scenario under *Steffel v. Thompson* (1974) 415 U.S. 452 whereby there would be justiciable controversy. Though of course the law prohibits rich and poor alike from sleeping under bridges (or, as here, urinating in alleys), any claims by the rich or "respectable" segments of society under this ordinance would be subject to attack under *Rizzo* and *Younger* as being unduly hypothetical. Thus, one would only have to find a plaintiff willing to publicly disgrace himself by declaring himself to be an inherently suspicious-looking person who has, as such, been directly threatened with arrest under the ordinance. Perhaps the individual so named could even constitute himself the representative of a class of other similarly-situated suspicious persons.

Of course, if the plaintiff so selected actually were arrested or prosecuted by state authorities after suit were filed, the case would be subject to immediate dismissal. (*Hicks v. Miranda* (1975) 422 U.S. 332.)

In order to frame a scenario for litigation of the validity of this ordinance which will fit under *Steffel* and survive attack under *Rizzo*, *Younger*, and *Hicks*, therefore, one must thus frame a farce. The situation is quite different than that of the labor picketers in *Steffel*, who had direct economic motivation to vindicate their rights, and who did not have to shame themselves in order to do so.

We do not think the framers of our constitution envisioned that in order to enforce its provisions, citi-

zens would have to participate in such a judicial version of low comedy; comedy which is just as "hypothetical" as the referenced plaintiff's claims in *Rizzo* and *Younger* because reality will prevent it from ever being staged.

Finally, if anything additional needs to be said along these lines, it should be noted that the courts of most states, including Michigan, adhere to the doctrine that they are not bound by the rulings of federal courts below the Supreme Court, even on constitutional issues. This means, simply, that even if a federal declaratory judgment of unconstitutionality were obtained, the state courts would not be bound to honor it and police could go right on claiming "good faith" — especially those who were not named as defendants and served with orders. This has led at times to situations which exasperated federal courts have been moved to describe as a "judicial runaround." (*Lucas v. People of Michigan* (6 Cir. 1970) 420 F.2d 259, 262; See also, e.g., *People v. Bradley* (1969) 1 Cal.3d 80, 86; 81 Cal. Rptr. 457; *People v. Cummings* (1974) 43 Cal.App.3d 1008, 1019; 118 Cal.Rptr. 289.)

This Court has not heretofore been willing to foreclose such "runarounds"; saying no more than that where such a judgment is issued by a three-judge federal court, which is affirmed on direct appeal to this Court, the implication is that any conviction under such a statute would be reversed by this Court. An "implication" is far less than a promise, though; for the court went on to say that even this proposition is "not free from difficulty." (*Steffel v. Thompson*, *supra*, 415 U.S. at 470.) Here, moreover, there will be no three-judge court, and thus no direct affirmance by this Court, because only a local ordinance is involved. (*Moody v. Flowers* (1967) 387 U.S. 97.)

Clearly, at least as far as the unconstitutional invasions sanctioned by this ordinance are involved, there is no way to reach them except by use of the exclusionary rule to suppress the evidence of other violations which are the hoped-for, if only infrequently realized, motivation for arrests under it.

E. Street Detention Is in Fact of Only Marginal Usefulness in the Control of Crime; Thus the Social Cost of Application of the Exclusionary Rule to It Is Minimal.

It has often been argued that each time the exclusionary rule is invoked, a "substantial social cost" is paid by society. (See, e.g., *Rakas v. Illinois*, *supra*, U.S. [47 U.S.L.W. at 4028]; *Stone v. Powell* (1976) 428 U.S. 465.) *Stone v. Powell*, of course, presents a situation which is half comparable to the instant case in that it involved a collateral attack on a conviction for murder on grounds the defendant had been initially arrested pursuant to a vague municipal loitering ordinance. (This factor had been declared "harmless error" both on direct appeal and by the district court on habeas corpus.)

The "social cost" argument of course appears most compelling when one takes an isolated case of murder and argues that the exclusionary rule should not be used to free a killer. But overall, the fact is that neither the exclusionary rule nor police "investigatory" stops of "suspicious" citizens found by chance upon the streets have very much at all to do with the government's ability to control violent crime. This proposition is proven by empirical research which has been conducted on the subject. In a recently published, elaborately researched study for the Ford Foundation, it has

been determined that the exclusionary rule has little or no impact on prosecutions for violent felonies, but only affects a significant minority of petty drug cases⁵ such as that involved here. Moreover, police field interrogation of miscellaneous persons on the street has no notable tendency to cut crime rates; what cuts crime is when the police get out of their squad cars and make themselves known to the "ordinary" citizens on their beat who then provide them with reliable information. When prosecutions fail, it is generally not the result of *Mapp* or *Miranda*, but of the failure of the police to do a workmanlike job of interviewing witnesses and retaining evidence of crimes reported to them. (Silberman, *Criminal Violence, Criminal Justice* (1978) Ch. 7, pp. 199-252. See also Rand Corp., *The Criminal Investigation Process* (1975) vol. 1 pp. vi-ix.) Also of great significance, and consonant with these findings, even petitioners' own supporting *amici*, the Citizens for Effective Law Enforcement, concede that their own research discloses no significant relationship between field interrogations and felony arrests. (Brief of Citizens for Effective Law Enforcement, 8-10.)

"Law and order" attacks upon the Bill of Rights and upon prior decisions of this Court which enforce it are thus in a very substantial way a smokescreen designed to make the judiciary scapegoats for police and prosecutorial authorities' inability to efficiently discharge their own duty. If this Court should allow

⁵For example, statistics compiled by the National Commission on Marijuana and Drug Abuse disclose that a total of 43% of the "outdoor" arrests for marijuana were initially based upon "suspicious behavior" or "suspected loitering". (National Commission on Marijuana and Drug Abuse, *Marijuana: a Signal of Misunderstanding* (1972) Appendix II, table 18 at p. 638.)

its own judgment to be obscured by that smokescreen, the result will not be so much safer streets as it will be a populace which is oppressed by arbitrary exercises of police power as well as by the maraudings of criminals.

The right to use the public streets unmolested by arbitrary police demands for "identification" is, as was pointed out in *Papachristou*, one of a number of "unwritten amenities [which] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity . . . they have encouraged lives of high spirits rather than hushed, suffocating silence". (405 U.S. at 164.)

Such "amenities" deserve the continued protection of this Court.

* * *

II

THERE ARE AMPLE GROUNDS FOR DECISION OF THIS CASE UNDER MICHIGAN STATE LAW: THE MATTER SHOULD BE REMANDED TO THE STATE COURTS FOR DETERMINATION OF THOSE GROUNDS.

A comparison of the points and arguments raised by respondent's counsel before the Michigan appellate court with the opinion of that court reveals that there are many potential independent grounds for decision of this case under the law of Michigan. These substantial grounds were passed over and ignored by the Michigan appellate court in a headlong race to decide the case on federal constitutional grounds.

Principles of federalism and of economy in the administration of federal justice lead to the conclusion

that state courts ought not to be permitted to touch off constitutional brouhahas of the type represented here by merely overlooking or ignoring their own law.

For example, at page three of his state appellate brief, respondent points out that the Michigan courts have held that vague laws violate the Constitution of Michigan as well as that of the United States, citing *People v. Adams* (1971) 34 Mich.App. 546, 558.

At page four, respondent went on to ask the court to construe several terms of the ordinance:

"What does it mean to 'identify' oneself properly under the ordinances? What is 'reasonable evidence' of one's 'true identity'? . . . Is some sort of document required? A document issued by whom? . . . Is it now required that all who cross the boundaries into the city of Detroit carry 'verifiable documents' such as a passport? . . ." (Ibid. p. 4.)

At pages 8-9 of the state appellate brief, it is suggested that the ordinance may be void under what would appear to be a state substantive due process doctrine. "The police power does not encompass the authority to make nonculpable conduct a criminal offense. See *City of Detroit v. Bowden* (1967) 6 Mich. App. 514." At page 13, a State Supreme Court decision, issued long before the Fourth Amendment was ever applied to the States (*People v. Burt* (1883) 51 Mich. 199, 202) is cited for the proposition that arrest is forbidden without probable cause to suspect a crime.

Finally, at pp. 18-22, respondent devotes an entire segment of his brief to an argument that the ordinance is void as being pre-empted by the exclusive authority

of the governor to declare states of emergency. (*Walsh v. City of River Rouge* (1970) 385 Mich. 623.)

Had any of these arguments been given favorable consideration by the Michigan Court of Appeal, the result would have made review by this Court unnecessary. Now, even though certiorari has been granted, there would be nothing to prevent the state court from determining those issues should this case be returned to it following reversal on the (federal) merits. Were this to occur, any exposition by this Court on the constitutional issues seemingly presented could be rendered purely hypothetical. In terms of Michigan's interests, there would then be only a "profitless reversal, which can do the plaintiff in error no good." (*Murdock v. Memphis* (1875) 87 U.S. (20 Wall.) 590, 635.)

As the court said in *Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126:

"We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (See also, *Lanza v. New Jersey* (1922) 260 U.S. 377, 387; *Fox Film Corp. v. Muller* (1935) 296 U.S. 207, 210; *Department of Mental Hygiene v. Kirchner* (1965) 380 U.S. 194, 197.)

In *International Steel & Iron Co. v. National Surety Co.* (1936) 397 U.S. 665, 666, it was held that if a state court might have rested its decision on state grounds but did not do so,⁶ application of the "inde-

⁶There is language in the opinion of the Michigan appellate court, reproduced at p. 21 of the appendix, which would support a colorable argument that the state court *did* base (This footnote is continued on next page)

pendent state ground doctrine" is not mandatory. This does not mean, however, that in the exercise of sound discretion, this Court cannot request a state court to clarify whether a case before it truly presents a federal question in a posture which is ripe for decision by this Court as a "case or controversy" under Art. III.

The most needed thing for the Michigan courts to do here is to construe the terms of this ordinance, for a narrowing construction could both obviate respondent's "vagueness" attack upon it and leave it clear that respondent's arrest was not authorized by the ordinance. For example, California has a partly comparable statute, California Penal Code section 647 (e), which requires that a person seen loitering at night identify himself when articulable circumstances exist to indicate that the public safety requires such identification. Section 647(e) does *not* permit police to place a citizen under custodial arrest for the purpose of ascertaining his identity. In *People v. Soloman* (1973) 33 Cal.App.3d 429, 108 Cal.Rptr. 867, it was held that this statute did not authorize arrest for the reason that an officer deems the explanation given by the citizen to be unsatisfactory or implausible. (Cf. Brief of State of California, pp. 9-13.) Were the Detroit ordinance read the same way, this case might never have come before this Court.

its decision on state grounds in that a decision of the Michigan supreme court [*Pinkerton v. Verberg*, 78 Mich. 573, 584, 44 N.W. 579 (1889)] decided prior to the incorporation of the Fourth Amendment into the Fourteenth by this Court, is cited for the proposition that the search here is unlawful. The argument in the text is thus not intended to contradict or foreclose respondent should he seek to demonstrate that the decision below was decided on independent state grounds; rather, it is as an alternative should such an argument not be made or should it be made and fail.

We are in full agreement with Professor Linde, who argues that since the decision by a state court of state law is an element of the process due in a state judicial proceeding, federalism *requires* the state court to resolve dispositive questions arising under its own law before reaching a federal claim. Linde, "Without 'Due Process': Unconstitutional Law in Oregon" (1970) 49 Ore.L.Rev. 125, 134.

Throughout most of this nation's history, it has been the state courts which have served as the primary guarantors of individual rights. (Hart & Wechsler, *The Federal Courts and the Federal System* [2d Ed. 1973] 359.) While it may or may not be true that "If our liberties are not protected in Des Moines, the only hope is in Washington" (Paulsen, "State Constitutions, State Courts, and First Amendment Freedoms" (1951) 4 Vand.L.Rev. 620, 642, we think this Court should insist that the courts in Des Moines and Detroit should be required to examine the matter of protection of local citizens' liberties under local law *before* trundling sets of litigants off to Washington through decisions based on what may be needlessly sweeping federal grounds.

This Court should exercise its discretion to vacate and remand to the Michigan courts for clarification along these lines.

Respectfully submitted,

QUIN DENVIR,

California State Public Defender,

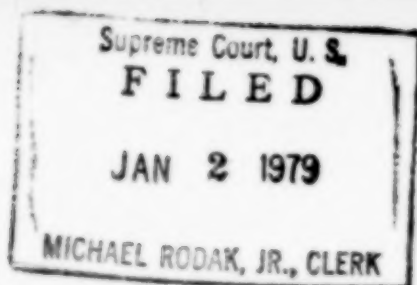
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Deputy State Public Defender,

Attorneys for Amicus Curiae.

Service of the within and receipt of a copy
thereof is hereby admitted this day
of December, A.D. 1978.

No. 77-1680



IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

GARY DEFILLIPPO, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE AND FEDERAL DEFENDERS OF
SAN DIEGO, INC., AS AMICI CURIAE IN SUPPORT
OF THE RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE

California Attorneys for Criminal Justice (CACJ) is a California organization of defense attorneys, public defenders, and interested law students whose common objective is the furtherance of criminal justice.

Federal Defenders of San Diego, Inc., is a private non-profit corporation chartered pursuant to the Criminal Justice Act in the Southern District of California for the purpose of providing competent representation to indigent defendants.

Both organizations are dedicated to the improvement of the administration of justice, the preservation of individual liberties, and to fairness for defendants involved in criminal prosecutions, the ramifications of which can have substantial impact on their lives.

Amici are extremely concerned over the outcome of the case at bar because of their common desire to protect the fundamental constitutional rights of all citizens, including those who may find themselves involved in a criminal prosecution as a defendant. Amici are dedicated to giving meaning to the Fourth Amendment provisions of the United States Constitution proscribing unreasonable searches and seizures, the Fifth Amendment provisions against self-incrimination, and the Sixth Amendment right to a fair trial and effective assistance of counsel. Amici strongly feel that the Michigan statute in question in the case at bar, if permitted to become operative again, will have a substantial adverse impact

on the rights of individuals protected by these constitutional amendments. Amici are concerned over the implications this ordinance has on the ability of the State to intrude upon the private lives of citizens without justification.

Accordingly, amici file this brief in support of the position taken by the respondent that the Michigan statute is unconstitutional.

SUMMARY OF ARGUMENT

Detroit Municipal Code Section 39-1-52.3 provides that a police officer may stop and question an individual if the officer believes that the individual's behavior warrants further investigation for criminal activity. The code section further establishes an affirmative duty on the part of the detainee to identify himself and to produce verifiable documents or other evidence of identification. Lastly, if the detainee is unable to provide (in the police officer's opinion) reasonable evidence of his true identity, the police officer may seize him and transport him to the nearest precinct in order to ascertain his identity.

The Detroit Code section leaves the justification for the initial encounter between the police officer and the individual, and the subsequent scope and duration of that encounter entirely to the discretion of the police officer. The police conduct authorized in this section is contrary to all established precedent. Both Terry and Adams provide that an officer may make a "brief stop" of a suspicious individual in order to determine his identity or to maintain

the status quo momentarily while obtaining more information. The ordinance in question, however, places no such restriction on the duration of the detention. In fact, the ordinance encourages protracted detention by placing an affirmative duty on the detainee not just to identify himself, but to produce documents which the police officer finds to be verifiable and reasonable evidence of the detainee's true identity. Furthermore, the ordinance also encourages not momentary maintenance of the status quo, but actual removal of the detainee from the place of inquiry to the police station. The ordinance also fails to describe the permissible extent of the inquiry by the police officer. How far a police officer may probe in order to satisfy himself that the detainee's true identity has been established is left to the whim of the officer. Furthermore, what information the detainee must provide in order to satisfy the affirmative duty placed upon him by the ordinance is also unaddressed. Since no limitations upon the officer's conduct are provided by the statute, the detainee's Fourth Amendment privilege to be secure in his person, house, papers, and effects, as well as his Fifth Amendment privilege against self-incrimination, is left unprotected.

What the ordinance actually accomplishes is an insulation of law enforcement officers from accountability for their actions. As long as the officer had a subjective belief that the "suspicious" individual had not adequately identified himself, any evidence obtained by this officer during the detention and interrogation of this individual would be immune from the application of the Fourth Amendment exclusionary rule. The

protections of the Fourth Amendment were specifically enacted to prevent undue police power and the tyranny of government. The ordinance in its present form, however, flies in the face of this protection by giving the police the power to stop and interrogate individuals at will. The ordinance, by providing a "good faith" defense to police officers for their actions, simply encourages continued violations of the protections afforded by the constitution.

LEGISLATIVE AUTHORIZATION OF AN ILLEGAL SEIZURE OF A PERSON MANDATES THE APPLICATION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE.

A. The Police Seizure Provision

At the time of the defendant's arrest, the Detroit Municipal Code Section 39-1-52.3 provided:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity." People v. DeFillippo, 80 Mich. App. 197, 200, 201 (1977).¹

This provision gives the awesome authority to the police in their numerous contacts

¹ The 1976 Amendment added an express provision to make it a crime for refusal to identify oneself, but the Michigan Court held that refusal to identify oneself was "implicit" in the ordinance as it read at the time of the defendant's arrest." 80 Mich. App. 197, 201 n.1.

and interactions with citizens in a large metropolitan community. The broad, sweeping power of inquiry permitted by the Municipal Code (hereinafter referred to as the ordinance) is not limited as, for example, is the case with immigration officers who are permitted to make inquiry of a person only if they suspect he is an illegal alien, or with a traffic officer who may stop and question someone they suspect of being a drunk driver, but authorizes unrestricted police inquiry for the purpose of "further investigation." The ordinance differs from the procedure outlined in Terry v. Ohio, 392 U.S. 1 (1968), where an officer, before he intrudes on a person's privacy, must be aware of objective, articulable facts permitting the conclusion that criminal activity is afoot. This requirement permits later judicial review of the reasonableness of the intrusion on some basis other than the subjective mental processes of the officer. The ordinance, on the other hand, shifts the focus from this objective requirement to the subjective experience and opinion of the officer. Thus, it amounts to an unwarranted expansion of the doctrine announced in Terry v. Ohio, supra.

Assuming, arguendo, that the initial stop and questioning under the ordinance was constitutionally justified, a second problem arises. The ordinance also establishes an affirmative duty on the person detained, the failure to comply with which is a crime, to identify himself or herself. The scope of the identity process requires oral communications from the detainee, and even more, the detainee must also produce "verifiable documents or other evidence" of identity. The permissible scope of the identification procedure is not defined

by the ordinance. May, for example, the officer require production of, in addition to the name, the date and place of birth of the detainee, his present or former addresses, his telephone number, height, weight, color of eyes, social security number, occupation, names and addresses of relatives, friends or persons in the community who would verify his identity? ² If the detainee produces a drivers license, what is the process whereby the officer can make verification if the state agency regulating drivers licenses is closed? Does the ordinance permit the detention to last long enough to permit a search through national or local law enforcement computer systems for existing warrants on the detainee? The permissible duration of identification is likewise not set forth by the ordinance. It could literally take hours to complete a record or warrant search and the process of verification of identity could take as long or longer. The balance between individual liberty and government intrusion thereon is clearly tipped in favor of the latter by the authorization given by the ordinance to selective police encounters and detentions. The ordinance might be characterized as a legislatively enacted "mini general warrant" or writ of assistance of persons. The original writ of assistance was directed towards the search for untaxed goods, but the invasion of privacy inherent in the procedure authorized by this ordinance is far more flagrant because it invades the privacy

2

Davis v. Mississippi, 394 U.S. 721 (1969), would condemn the use of the ordinance to fingerprint several suspects.

of the person.

Under the ordinance, the decision as to whether the identification requirement has been satisfied rests entirely with the officer in the field, and, as noted, failure to satisfy the officer invokes the penalty provision justifying arrest. Although the ordinance uses euphemistic language providing for the transporting of the detainee to the nearest precinct to ascertain identity, the facts in the instant case show that the respondent's failure to satisfy the officer about his identity resulted in his immediate arrest. (App. 9). A search incident to that arrest was then conducted and marijuana and phencyclidine were found on his person. (App. 6-7, 9). Thus, the true purpose of the ordinance was exposed. If its purpose were to merely maintain the status quo to permit further inquiry into identity, the search of the person (more than a pat-down or frisk) was clearly not justified. However, the provision in the ordinance provides for the transportation of the detainee, which is so substantial a deprivation of his liberty as to amount to an arrest.

The dynamics of street encounters with this police field investigation tool cannot be discounted. The citizen, when confronted by the officer in a situation where the officer feels that further justification is necessary, may be stopped, frisked, and questioned. The period of detention is open-ended, and although Terry v. Ohio, supra, and Adams v. Williams, 407 U.S. 143 (1972), permit brief stops, nothing in those opinions permits the prolonged detention allowed here. The very nature of the ordinance provides for protracted detention

and even forced removal to a police station. It fails to describe the permissible extent of the inquiry to be conducted pursuant to its provisions. No guidance is provided as to what the citizen must provide in the way of information. For example, in the American military, soldiers are taught specifically that in the event of capture they are to give their name, rank and service number. There is no such guidance to the prospective detainee. Even if the subject of the inquiry provided detailed information of identity, it may never satisfy the totally subjective evaluation of the detaining officer. Under the rubric of an "identity inquiry" police questioning could wander into areas other than identity and constitute a serious invasion of the person's privacy. The citizen responding to an officer so empowered would be hard-pressed not to provide whatever information was requested, and no provision is made for cautioning against potential violations of the Fifth Amendment privilege against self-incrimination. In some cases, the very production of identity might constitute an offense, i.e., altered or forged identity documents. ³

³ The detainee in the instant case represented himself to be a police officer (Sergeant Mash) which could have provided cause for arrest for false impersonation of a public officer (MCLA 750.215). If the pat-down properly revealed the marijuana (App. 6), probable cause for arrest would exist. If probable cause was found based on discovery, the constitutionality of the ordinance may not be in question.

This ordinance empowering police to stop, search, and seize persons runs contrary to the express provisions of the Fourth Amendment. The Fourth Amendment was drafted as a response to the overreaching of governmental officials, albeit it was at that time a foreign government. Early American history affords other examples of government intrusions into the private lives of citizens such as the English impressing American seamen into the British Navy because of their failure to give adequate proof of their identity as Americans. The protection of the Fourth Amendment is directed towards undue police power and the tyranny of government. Our scheme of political democracy dictates an equality between the individual and the state, as well as its minions. The petitioner's claim that a balancing of the interest of the individual against the state recognizes this ordinance as consonant with the underlying principles of the Fourth Amendment is inaccurate. They cannot be so reconciled. The ease with which the Court has approved of police practices and narrowed the exclusionary rule (most recently in Rakas v. Illinois, U.S. (47 U.S. L.W. 4025, 5 December 1978), which attacks the exclusionary rule by greatly constricting the concept of standing) has generated the not-unexpected claim for the judicial confirmation of the most extreme position. On the police-citizen street encounters, the balanced view was expressed by Mr. Justice White in Terry v. Ohio, where in his concurring opinion he stated:

"There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." Terry v. Ohio, 392 U.S. 1, 34 (1968).

B. The Authorized Police Conduct is Contrary to All Established Precedent.

In Terry v. Ohio, *supra*, the Court permitted under the Fourth Amendment a limited seizure of the person to protect the officer making inquiry after a determination that there was reasonable suspicion that an offense might be in the making. The police officers patted down the suspect and found a loaded revolver. The Court did not reach the issue of whether or not the officers could interrogate the person. The case provided for an expansion of police powers, because the seizure of the person was justified on a basis less than probable cause: reasonable suspicion. The seizure was necessary

to provide adequate safeguards for police officers, and the protection of the officer was balanced against the minor intrusion to the person. In Adams v. Williams, supra, four years later, the court again permitted a minor intrusion, a protective frisk, to allow a police officer to remove a weapon from the waistband of a suspect. The Adams case did not involve an interrogation, but rather the results of the limited seizure based upon reasonable suspicion. Thereafter the officer effectuated an arrest and conducted a search incidental thereto. The court restated the general rule:

"A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." 407 U.S. 143, 146.

Although the petitioner emphasizes the language that permits the determination of identity (Petitioner's Brief 25 n.10), they fail to concentrate on the critical language that refers to a "brief stop". That language is not limited to the subjective assessment of the officer or the need for further investigation but refers to a "suspicious individual," which necessitates an articulable objective basis subject to later court review that the inquiry was in fact reasonable. The co-equal language that would permit the brief stop to maintain the status quo, momentarily, again emphasizes that the duration of the contact is to be brief, which is clearly inconsistent with the conduct authorized under the Detroit

ordinance.

The petitioner's reliance on Almeida-Sanchez v. United States, 413 U.S. 266 (1973), is inappropriate. That case dealt with a statute, 8 U.S.C. Section 1357(a)(3), which permitted the Immigration Service to conduct warrantless searches of automobiles within a reasonable distance of any external boundary of the United States. The Court in Almeida, supra, held that search of the automobile must be based upon probable cause to be consistent with the Fourth Amendment. The statute was part of an administrative framework to prevent illegal immigration, but the Detroit Ordinance is inextricably bound up with police investigative procedure of all offenses. Further, the Detroit Ordinance makes failure to cooperate with the police a criminal offense, which, instead of distinguishing it from Fourth Amendment scrutiny, increases it. A case of more proximate application would be United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Under a federal statutory provision immigration officers were authorized without a warrant "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States." 8 U.S.C. 1357(a)(1). The Government contended this power of inquiry permitted a stop of any automobile without any basis whatsoever, but the Court, not requiring these federal law enforcement officers to have probable cause to make a stop (which would be required for a search), did require that there be a "reasonable suspicion" to stop a car in the border area. Apparent Mexican ancestry was not enough. Brignoni-Ponce would undermine

that portion of the ordinance that would permit anything less than reasonable suspicion to justify a stop. ⁴

Nothing in any of the existing cases of this Court permits a stop on less than reasonable suspicion, leaves the nature and duration of the stop up to the unfettered control of the police officer, or permits police officers to take into custody those who failed to provide adequate identification.

C. The Unlawful Seizure and Subsequent Search Were Not Sanitized by the Officers' "Good Faith."

The Executive Branch cannot promulgate regulations justifying searches inconsistent with the Fourth Amendment (i.e., Almeida-Sanchez v. United States, supra), nor may an executive officer issue a search warrant which would justify the subsequent conduct of the police officers in conducting a search only unless the executive officer does in fact have the authority to issue it. (Coolidge v. New Hampshire, 403 U.S. 443 (1971)). In Whitely v. Warden, 401 U.S. 560 (1971), this Court

⁴ The Court's subsequent decision in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), dealt with the situation of a fixed permanent checkpoint for aliens which would permit a brief intrusion in the border area where adequate notice had been well established. That case would appear inapplicable because the ordinance permits wide-ranging stops for any investigative purpose anywhere, at any time, in the municipal geographical limits.

through the opinion written by Mr. Justice Harlan rejected the arguments that the reliance of officers on another officer's radio bulletin was sufficient to insulate a challenge to an otherwise illegal arrest. 401 U.S. 568. If magistrates or other judicial officers issued warrants in proper form to law enforcement officers, the fact that those officers executed those warrants in good faith will not preclude an attack on the judicially authorized searches. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). If the Fourth Amendment exclusionary rule is not insulated by the officer's reliance upon the actions of the Executive or Judiciary, a special exception may not be created for legislative fiats. The magistrate issuing a search warrant often acts with dispatch to meet immediate needs of law enforcement officers desirous of a quick seizure. Often time for careful deliberation is limited. The legislature, especially when dealing with an ordinance directed toward expanding police powers and permitting the detention and seizure of persons, has the advantage of the slow deliberative process in the promulgation of such laws as well as the thoughtful input of experienced legal counsel. The acts of a legislature should be held to high standards in properly respecting the implications of the Fourth Amendment. Adoption of the position espoused by the petitioner encourages the enactment of overly broad legislative standards which insulate the police from Fourth Amendment attacks on their conduct. For example, the legislative body might adopt a rule; which provided: "All searches and

seizures conducted by law enforcement officers within the scope of their duty are lawful." The officer in reliance on this legislative grant of authority could not be criticized nor would any Fourth Amendment remedy be available to a defendant in a criminal proceeding. Such a rule would sanction and encourage improper conduct on both the part of legislative bodies as well as law enforcement authorities.

In Henry v. United States, 361 U.S. 98, 102 (1959), this Court stated: "Good faith on the part of the arresting officers is not enough." In Beck v. Ohio, 379 U.S. 89, 97 (1964), Mr. Justice Stewart speaking for the court held:

"If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

D. The Erosion of the Exclusionary Rule
Also Eliminates Any Deterrence of
Police Invasions of Privacy Rights

In Stone v. Powell, 428 U.S. 465 (1976), the majority opinion refers to two purposes for the exclusionary rule. The primary purpose for the exclusionary rule is the deterrence of police conduct that violates Fourth Amendment rights. 428 U.S. 465, 486. The Court refers to the "imperative of judicial integrity," but indicates that this purpose of the rule is of limited application in light of the Court's decisions requiring an objection, limiting standing, restricting the rule to certain proceedings (not the Grand Jury), and permitting its use in impeachment of a defendant who testifies. 428 U.S. 465, 485-486. Because of the successful appeals of law enforcement agencies, the salutary protection of privacy has been significantly diluted.

1. Without the Exclusionary Rule, the Fourth Amendment is Meaningless.

The protection afforded by the Fourth Amendment has a restraint upon government and its agents. The right of privacy or security vests in the individual, but there must be some means to afford the protection. If the government itself seeks to violate the rules, who will there be to guarantee the privacy or security afforded by the Fourth Amendment to the individual? The State has only those powers afforded to it by its constitution, and there must be some procedure for enforcing that right.

Criminal cases are one of the most common confrontations between the State and the individual, and it is in those reoccurring proceedings that the State must be subjugated to the interests of the individual as defined by the Constitution. In its enforcement proceedings of its criminal law, those constitutional limitations must apply. Without a sanction on officers who violate the constitution, the Fourth Amendment is a paper-tiger exercise of rhetorical oratory. This was best said in Weeks v. United States, 233 U.S. 383, 393 (1914), where the Court then stated:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

The early statements of the purpose of the rule rely heavily on the fundamental principles upon which the Fourth Amendment was founded. There was no balancing or weighing of process.

Chief Justice Taft in Olmstead v. United States, 277 U.S. 438, 462 (1928), commented:

"The striking outcome of the Weeks case and those which followed it was the sweeping

declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in Court, really forbade its introduction, if obtained by government officers through a violation of that amendment."

In Mapp v. Ohio, 367 U.S. 643 (1961), which outlines the history and development of the Rule, the Court echoed, through the opinion of former Attorney General Mr. Justice Tom Clark, the continuing sentiment that the Fourth Amendment was self-executing:

"Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as it used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention and a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence

as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'." 367 U.S. 643, 655.

Given these pronouncements on the fundamental character of our constitutional charter, it would seem anomalous that the City of Detroit, through an ordinance, could effectively overrule the Fourth Amendment protections of all who live or travel inside its boundaries by vacating the application of the exclusionary rule for its police officers.

2. The Imperative of Judicial Integrity was Designed to Insulate the Judiciary from Participation in Violations of the Fourth Amendment.

In Weeks, the United States Marshal, an officer of the court, improperly secured evidence by an unlawful search and seizure, and the Court held the evidence inadmissible. The Court held:

"To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action." 232 U.S. 383, 894.

The same purpose was acknowledged in Mapp v. Ohio, 367 U.S. 643, 648-649,

659-660 (1961). The phrase "the imperative of judicial integrity" was fashioned in Elkins v. United States, 364 U.S. 206, 222 (1960), but it had earlier origins. The philosophical foundation of this principle was based on law as well as morality. If violations of the Fourth Amendment were tolerated by the Court, there would be a participation or cooperation by the Court in the violations. The continued reoccurrence of violations and the continual acceptance by the Court would further give rise that judicial officers, taking an oath to support the Constitution of the United States, had not complied with their oaths. The fact that exceptions exist today inconsistent with earlier precedent to justify other competing values, does not lessen the logic that there is a tolerance of an evil. Pragmatically, it may be said, in support of those opinions which have sorely narrowed the exclusionary rule, that it is the court's determination that the lesser evil is selected.

In the context of this case, the Court would judicially sanction the abolition of the exclusionary rule by permitting any legislative body to provide the necessary insulation to preclude its application. That action would only encourage continued violations of the Constitution and would involve the judiciary in fashioning an imprimatur for such conduct. Such a conclusion would not only abrogate the meaning and purpose of the Fourth Amendment as a restraint on police activity, but it would viscerate the role of the judiciary to fairly scrutinize police conduct and to determine

whether or not it was "reasonable" under all the circumstances. Now, the court has been offered an "easy out" through a legislative body to insulate police officers from the strictures of the Fourth Amendment.

3. The Right of Privacy of Citizens is Protected by the Fourth Amendment's Exclusionary Rule.

In Mapp, this Court recognized "the exclusion doctrine (as) an essential part of the right of privacy." 367 U.S. 643, 656. In Katz v. United States, 389 U.S. 347 (1967), the Court reasoned that the "Fourth Amendment protects people, not places" (389 U.S. 347, 351) and noted that the Fourth Amendment protects individual privacy against certain kinds of government intrusions. Recently, there is confusion and ambiguity as to whether or not the Fourth Amendment is directed at the protection of places or things or the integrity of the person. Earlier cases required that for standing to assert the Fourth Amendment exclusionary rule there had to be a technical trespass on property. This rule fell under the Katz doctrine which eliminated the artificial trespass requirement in favor of a reasonable expectation of privacy of an individual. This month, in Rakas v. Illinois, ___ U.S. ___ (47 U.S.L.W. 4025) 5 December 1978), the Court denied standing to passengers to complain about a search of an automobile. Even with this narrowing of the concept of standing, it has no application in this case which deals with the police intrusion of a citizen's person and liberty. Under United States v. Chadwick, 433 U.S.

1 (1977), before a locked suitcase once detained may be examined, a search warrant must be obtained. The intervention of the judicial officer is available to protect property, but in the instant case, there was no antecedent judicial review provided. The individual could be stopped, questioned, arrested, and taken into custody, transported to a police station, and detained until the "true identity" was discovered. The only judicial intervention might be by writ of habeas corpus, assuming that the person so detained would have access to counsel during the period of detention. The grossest invasions of personal liberty are threatened by the Detroit Ordinance.

4. Proof to the Public that Government Officials Comply with the Fourth Amendment is Necessarily Required by the Clear Cut Application of the Fourth Amendment's Exclusionary Rule.

Although the public wants effective enforcement of the criminal law, the public also wants the rights of the individual and his or her property respected. Several well-publicized cases of law enforcement officers engaged in unwarranted searches have aroused public indignation. These officers of the Government are subject to the law. The failure of our system of justice to bring to account those who violate both the Constitution and the rights of privacy of others may have awesome consequences. The courts must strive to ensure that the agents of governments are made responsible to the extent that the public is fully aware of it. The

best articulation of that basis was made by Mr. Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485 (1928):

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

If police officers with legislative authority could conduct any type of search and not be held accountable because of their "good faith" reliance upon an unconstitutional and defective ordinance, respect by the citizenry for the courts would reasonably be impossible to obtain.

5. The Fourth Amendment Exclusionary Rule is Designed to Deter Present and Future Police Misconduct.

This oft-sighted basis for the exclusionary rule is the limitation of police misconduct to control law enforcement excesses in pursuit of desired goals. The competing interests of the protection of the individual (a consideration of the scope of the intrusion) is balanced against the needs of law enforcement. Field interrogation may be a needed asset in the arsenal of law enforcement, but uncontrolled, unsupervised, and unlimited, cannot be tolerated. Terry v. Ohio provided essential protection for the police officer and allows limited seizures justified by reasonable suspicion, but without probable cause or a warrant. The Detroit Ordinance applied to the facts of this case demonstrates the variance from Terry v. Ohio. The Ordinance is a "catch-all" to arrest uncooperative persons not even suspected of an offense. If the Detroit Ordinance is sustained to provide a "good faith" defense to law enforcement officers, every jurisdiction will adopt a similar ordinance for the clear purpose of insulating officers from accountability of their actions in criminal cases.⁵

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Good faith reliance or legislative authorizations to act is sometimes relevant for purposes of retroactivity analysis where new constitutional principles are announced. United States v. Peltier,

Although the Second Circuit held

422 U.S. 531 (1975). No new rule is involved as this case is controlled by Terry v. Ohio. It is also relevant in civil suits. See, e.g., Williams v. Gould, 486 F.2d 547 (9th Cir. 1973) (Suit under 42 U.S.C. 1983 (Federal Civil Rights Act) for warrantless invasion by police officer of apartment; held that good faith of officer is an available defense.) In reversing the trial court, the circuit court held:

We comment on the merits of the defense in only one respect. Because the defense rests on good faith and reasonable belief, Officer Gould need not, in order to establish the defense, prevail on the legal position that a warrant is not required to enter a home to arrest a felon. Whether a warrant is required in such a situation is an open constitutional issue. It divides the Supreme Court. Williams v. Gould, supra, at 548. See also Coolidge v. New Hampshire, 403 U.S. 443, 476-82 (1971). Either view as to its ultimate resolution might be entertained reasonable and in good faith. Coolidge v. New Hampshire, supra, at 548.

that federal police officers and agents have no immunity from suits charging violation of constitutional rights. (Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1347 (2d Cir. 1972)) the officer need not prove probable cause to establish a defense. He must only show that he acted in good faith and with a reasonable belief in the validity of the arrest and search. Id. at 1348. Cf., Abramson v. Mitchell, 459 F.2d 955, 957 (8th Cir. 1972), (good faith reliance on court order to intercept wire or oral communication is not an absolute defense to civil suit).

To sanction the ordinance or the inapplicability of the exclusionary rule in this case would be a "green light" to law enforcement officers that even the deterrence rationale for the exclusionary rule has been obliterated.

E. A Wrong Without Redress: There Are No Existing Alternatives to the Exclusionary Rule. ⁶

Under the aegis of this Detroit Ordinance, police officers may violate

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A general discussion of the alternatives to the rule may be found in Sevilla, "The Exclusionary Rule and Police Perjury" 11 San Diego L.R. 839, 845-859 (1974).

with impunity both the letter and spirit of the Fourth Amendment. Criminal sanctions exist on paper (18 U.S.C. 241: conspiracy against the rights of citizens and 18 U.S.C. 242: deprivation of rights under color of law) to deter such misconduct but seldom are such prosecutions initiated. When they are, as in the case of the infamous Collinsville, Illinois, drug raids, rarely are these prosecutions successful. Dean Wigmore in his Treatise on Evidence suggested the use of criminal contempt.⁷ The defendant convicted of the offense goes to prison, but the officer who violated the Constitution by an unlawful search is sent to jail. Prosecutors filing such criminal actions, by statute or by

7 "The natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, *i.e.*, by sending for the high-handed, overzealous marshal who had searched without a warrant, imposing a thirty day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal."

8 Wigmore, Evidence, Section 2184 (3d ed. 1940).

contempt, would immediately alienate the law enforcement officers with whom they must regularly work. That is why they are not commenced.⁸ Internal discipline

8 One group of researchers could find no reported prosecutions for police misconduct between 1956 and 1969.

We have been unable to unearth any additional reported cases for the subsequent 13 years. No authoritative explanation has been given for the absence of prosecution for police offenses, but the reasons are not difficult to surmise. Prosecutors are probably reluctant to enforce these dormant criminal sanctions against police offenses because they anticipate, in our view correctly, a detrimental effect on law enforcement which is the goal of both departments, and because they consider the punishment too harsh.

LAW AND ORDER RECONSIDERED, REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 382 (1969). As of 1960, less than half the States had punitive sanctions against police invasions of the right to privacy. Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961).

by the police agency itself is unrealistic and non-productive, for these covert administrative proceedings will be more concerned with the protection of the officer than with the person offended by the alleged misconduct. The recent turmoil within the Federal Bureau of Investigation concerning alleged illicit searches carried out pursuant to high level authorization has not yet been resolved, but few disciplinary actions have been taken. 9

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The Attorney General has now proposed legislation that would grant absolute immunity to federal officers but, in exchange, would create an open disciplinary proceeding in which the parties aggrieved would participate.

Much of the problem of police privacy violations could be alleviated with better internal police review. However, most "(c)ommentators believe that internal police disciplinary actions are incapable of dealing with police violation of constitutional guarantees."

Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives, 2 J. of Legal Studies, 243, 277 (1973). This conclusion derives from a reluctance of old-line police chiefs to obey the courts' strictures in the Fourth Amendment area. Dr. Egon Bittner quotes several former big city police administrators who condoned law-

As an alternative to the exclusionary rule in criminal cases, some have suggested a substitute civil action against the government with a maximum limitation on recovery; however, existing law permits such civil actions in addition to the exclusionary rule. A civil rights action against state offi-

less conduct by police officers in order to achieve desired ends.

Thus, Superintendent Wilson of Chicago declared, "If we follow some of our court decisions literally, the public would be demanding my removal as Superintendent of Police and--I might add--with justification." Chief Parker of Los Angeles has taken the view that, 'It is anticipated that the police will ignore these legal limitations when the immediate public welfare appears to demand police lawlessness.' And Chief Schrotel of Cincinnati has stated the dilemma of the policeman in these terms: 'Either he abides by the prescribed rules and renders ineffective service, or he violates or circumvents the rules and performs the service required of him.'

E. BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY, 28-29, n.45 (1973).

cers exists under 42 U.S.C. 1983 (See Monroe v. Pape, 365 U.S. 167 (1961), and since 1971 a money damages action may be brought against a federal officer for violation of the Fourth Amendment. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The initiation of a federal civil action entails many relative expenses, the principal cost of which is legal fees.¹⁰ The inherent costs are an overwhelming deterrent to such litigation. Practicing lawyers experienced in litigation of this nature know that the attainment of compensatory damages, let alone the cost of litigation, are illusory. On the merits of the case, the plaintiff must overcome the legal obstacle of the "good faith" defense.

In Norton v. United States, 581 F.2d 390 (4th Cir. 1978), cert. denied, U.S. ____; 47 U.S.L.W. 3391, (5 December 1978), an action was brought by a person whose apartment was forcibly entered without a search warrant by officers with drawn guns. The action was filed against state officers (42 U.S.C. 1983) and federal officers (Bivens) as well as the United States under the 1974 amendment to the Federal Tort Claims Act (28 U.S.C. 2680 (h)). The court of appeals noted that

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Defense of such suits is also costly, for in many cases where a federal agent and the government are sued, the Department of Justice pays for the agent's separate attorney. At \$60/hour these legal fees have amounted to \$100,000.

in civil actions against the individual state or federal officers, they had a defense if they acted in good faith with a reasonable belief of the lawfulness of their conduct. 581 F.2d 390, 393 n.2. The Court also found that the defense was also available to the United States. The "good faith" defense has swallowed whole potential civil actions against officers for Fourth Amendment violations. This defense must not be extended to the already now severely restricted exclusionary rule for criminal cases. Only the affluent and powerful are able to commence and maintain such civil actions, but the poor and powerless are incapable of pursuing such civil remedies against wealthy and resourceful government agencies defending the actions of the officers. The criminal case admittedly is a limited form to provide redress for those subject to illegal police searches, but something is better than nothing. The instant criminal action was the vehicle for the successful challenge of the impermissible and unconstitutional ordinance.¹¹

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As Professor Dallin Oakes states: "The advantage of the exclusionary rule--entirely apart from any direct deterrent effect--is that it provides an occasion for judicial review (of alleged violations of constitutional rights) and it gives credibility to the constitutional guarantees." Oakes, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 756 (1970)

The exclusionary rule has the additional advantage of minimizing litigation. To attain civil redress, an additional suit must be filed in over-worked courts. The efficient and therapeutic aspect of the exclusionary rule is that it vindicates the right of a person aggrieved and at the same time constitutes only a mild censure of the law enforcement misconduct. If anything, the exclusion of evidence is an appeal to the professionalism of the police to do a better job in the future. It contains no sanctions other than a moral exhortation for compliance with the ideals expressed by the Fourth Amendment. ¹²

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The exclusionary rule has played an important role in initiating and maintaining police training of search law in the more advanced departments. See, e.g., Wilson & Alprin, Controlling Police Conduct: Alternatives to the Exclusionary Rule, 36 LAW & CONTEMP. PROB. 488, 498-99 (1971).

To continually erode the Fourth Amendment exclusionary rule in criminal cases without a viable, readily accessible and effective alternative ¹³ is to foster a serious misconception that some recourse exists for wrongs committed by law enforcement officers. Already, authority exists for initiating civil suits against individual officers as well as government agencies, but few such suits are filed. This is not

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In fact, discussion of alternatives to the exclusionary rule is deceptive. "Their statement conveys the impression that one possibility is as effective as the next. For there is but one alternative to the rule of exclusion. That is no sanction at all" Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting). Former Chief Justice Traynor of the California Supreme Court in People v. Cahan, 44 Cal. 2d 434, 447 (1955), stated the problem in similar terms: "Experience has demonstrated, however, that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures"

because of few grievances. The civil mechanisms to provide relief simply do not work. ¹⁴ To refer to dysfunctional remedies as alternatives is less than honest.

Until civil suits are prosecuted against the offending officers and their agencies with diligence and ardor and

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In Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), the police had conducted over 300 searches of homes over a 19-day period without warrants and based upon anonymous tips. An injunction was granted, the circuit court holding:

There can be little doubt that actions for money damages would not suffice to repair the injury suffered by the victims of police searches. . . . (T)he wrongs inflicted are not readily measurable in terms of dollars and cents. Indeed, the Supreme Court itself has already declared that the prospect of pecuniary redress for the harm suffered is 'worthless and futile'. Moreover, the lesson of experience is that the remote possibility of money damages serves as no deterrent to future police invasions. Id. at 202. See also URBAN POLICE FUNCTION, Section 5.3, at 152.

with counsel appointed to pursue such actions much in the fashion that counsel is appointed under the Criminal Justice Act (18 U.S.C. 3006A), for those financially unable to retain counsel, legal remedies will be little more than hollow words. The creation of meaningful civil remedies may be far more punitive on law enforcement than the now modest impact of the exclusionary rule in criminal cases. Today, redress in civil courts for a violation of the Fourth Amendment is a rare occurrence. Wrongs proliferate, but redress shrinks. Further erosion will make the Fourth Amendment nothing more than an unkept promise of privacy and protection from government excess. ¹⁵

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The right of privacy, the "most comprehensive of rights and the right most valued by civilized men," Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting) is a right so precious that it would be foolish to abruptly abandon the predominant remedy for its violation and rely on ineffectual alternatives. Many of the exclusionary rule's opponents recognize this and conclude that the rule should not be abandoned in the absence of a realistic alternative remedy for conduct violating the Fourth Amendment.

CONCLUSION

For the foregoing reasons, as well as those contained in respondent's brief, amici respectfully submit that this Court should affirm the decision of the Michigan Court of Appeals.

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